UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF TEXAS

BEFORE THE HONORABLE STACEY G. JERNIGAN, JUDGE

In Re:	Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	
Debtor.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Adv. Proc. No. 21-03003-sgj
Plaintiff,	
v.	MOTION for SUMMARY JUDGMENT and OMNIBUS MOTION to STRIKE
JAMES DONDERO,	
Defendant.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Adv. Proc. No. 21-03004-sgj
Plaintiff,	
v.	MOTION for SUMMARY JUDGMENT and OMNIBUS MOTION to STRIKE
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS., L.P., et al.,	
Defendants.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Adv. Proc. No. 21-03005-sgj
Plaintiff,	
v.	MOTION for SUMMARY JUDGMENT and OMNIBUS MOTION to STRIKE
NEXPOINT ADVISORS, L.P., et al.,	
Defendants.	April 20, 2022 Dallas, Texas

Captions continue on next page;
appearances begin on next page.

In Re:	Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	
Debtor.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Adv. Proc. No. 21-03006-sgj
Plaintiff,	
v.	MOTION for SUMMARY JUDGMENT and OMNIBUS MOTION to STRIKE
HIGHLAND CAPITAL MANAGEMENT SERVICES, INC., et al.,	
Defendants.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Adv. Proc. No. 21-03007-sgj
Plaintiff,	
v.	MOTION for SUMMARY JUDGMENT and OMNIBUS MOTION to STRIKE
HCRE PARTNERS, LLC (N/k/a NEXPOINT REAL ESTATE PARTNERS, LLC), et al.,	
Defendants.	April 20, 2022 Dallas, Texas

Appearances:

For the Plaintiffs (Via WebEx):	John A. Morris Hayley Winograd Pachulski Stang Ziehl & Jones LLP 780 Third Avenue, 39th Floor New York, New York 10017-2024
For Defendant James Dondero (Via WebEx):	Michael P. Aigen Deborah Rose Deitsch-Perez Stinson, L.L.P. 3102 Oak Lawn Avenue, Suite 777 Dallas, Texas 75219

Appearances continued on next page.

Appearances, continued:

For Defendant John Dondero (Via WebEx):	Jeremy A. Root Stinson L.L.P. 230 West McCarty Street Jefferson City, Missouri 65101
For Defendant John Dondero (In courtroom):	Clay M. Taylor Bonds Ellis Eppich Schafer Jones LLP 420 Throckmorton Street, Suite 1000 Fort Worth, Texas 76102
For Defendants NexPoint and Highland Capital Management Fund (Via WebEx):	Davor Rukavina Julian Preston Vasek Munsch, Hardt, Kopf & Harr 500 North Akard Street, Suite 3800 Dallas, Texas 75201-6659
Digital Court Reporter:	United States Bankruptcy Court Michael F. Edmond Sr., Judicial Support Specialist 1100 Commerce Street, Room 1254 Dallas, Texas 75242
Certified Electronic Transcriber:	Susan Palmer Palmer Reporting Services

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Wednesday, April 20, 2022 9:41 o'clock a.m.

P R O C E E D I N G S

THE COURT: All rise. The United States Bankruptcy Court for the Northern District of Texas, Dallas Division, is now in session, the Honorable Stacey Jernigan presiding.

THE COURT: Good morning. Please be seated.

All right. We have a long setting today in the Highland Note adversary proceedings. We have one lawyer here in the courtroom and many on WebEx. So let's start by getting appearances. Who do we have appearing for the plaintiff this morning?

(Echoing voices.)

THE COURT: All right.

MR. MORRIS: This is —

THE COURT: Go ahead.

MR. MORRIS: This is —

(Echoing voices.)

THE COURT: All right. Mr. Morris, we're getting an echo from you. I don't know if you can hear what we hear, but do you have two different —

(Echoing voices.)

MR. MORRIS: If I exit, I'll be...

THE REPORTER: He's on twice here.

THE COURT: Okay. We're showing from our end that you are on twice, that you have two —

MR. MORRIS: Okay, is that better?

THE COURT: Oh, yes.

MR. MORRIS: Perfect, we're all set.

THE COURT: There we go. Okay, so let's get your appearance on the record.

MR. MORRIS: Anything — that I fixed that problem. Good morning, Your Honor. John Morris, Pachulski, Stang, Ziehl and Jones for Highland Capital Management. There are three matters on for today's hearing which I'll discuss more fully after I make my appearance. I just wanted to note that I will argue the plaintiff's motion to strike and for sanctions. I'm presuming that we go in this order.

My colleague Hayley Winograd will argue the defendant's motion to strike and then I will return to argue plaintiff's motion for partial summary judgment. So you'll hear from me today on two of the three motions and you'll hear from Ms. Winograd on the third motion.

THE COURT: All right. Thank you.

Now for, I guess, the pleadings call them the agreement or the alleged agreement defendants. Maybe we have multiple attorneys appearing for them. So I'll hear — well, first for James Dondero, who do we have appearing?

MR. TAYLOR: Good morning. Clay Taylor on behalf of Mr. Dondero. However, arguing the motions that are to be heard today will be the Stinson law firm, and I will defer to them, to

which individuals are going to be arguing which motions.

THE COURT: Okay. Thank you.

All right. Hopefully people could hear. Mr. Taylor appeared for Mr. Dondero here in the courtroom, but he said the Stinson law firm will be making arguments.

So who do we have appearing for which defendants at the Stinson law firm?

THE REPORTER: She's on mute, Judge.

THE COURT: You're on mute.

Is that Ms. Deitsch-Perez?

THE REPORTER: Yes.

MS. DEITSCH-PEREZ: Yes, it is. I'm sorry. Can you — can you hear me now?

THE COURT: Now I can. Thank you.

MS. DEITSCH-PEREZ: Okay. Good morning. This is Deborah Deitsch-Perez from Stinson and we will be arguing on behalf of Mr. Dondero, on behalf of HCRE and HCMS, although we will briefly also cover, just for the sake of coherence in the argument — the arguments that are being made with respect to the term loan slightly, although that will largely be covered by Mr. Rukavina, who will be arguing on behalf of NexPoint and HCMFA.

On our side, I will be arguing the motion for summary judgment. Mr. Root, Jeremy Root, another of my partners, will be arguing the debtor's motion for contempt and sanctions and to strike. And Mr. Aigen will be arguing the defendant's motion to

strike the Klos declaration that included evidence for the first time in the debtor's reply brief.

THE COURT: Okay. Thank you.

MS. DEITSCH-PEREZ: But I will leave Mr. Rukavina to introduce himself.

THE COURT: All right. Mr. Rukavina, are you out there?

MR. RUKAVINA: Yes, Your Honor. Good morning. Davor Rukavina and Julian Vasek. Can the Court hear me?

THE COURT: Yes.

MR. RUKAVINA: Your Honor, I'll be handling all matters related to HCMFA and all matters related to NexPoint except the joint issue regarding the alleged agreement.

I also, Your Honor, would suggest that we not take these matters piecemeal. I would suggest that debtor present its arguments and evidence on all motions and then the defendants respond at once. That's how Ms. Deitsch-Perez and I at least have prepared our presentations.

THE COURT: All right. First, are there any more lawyer appearances?

All right. Well, let's — let's talk about the sequence and time allotments for arguments. I know there were emails, I think last Thursday, among counsel and my Courtroom Deputy. And I just assumed we were going to break these up from the emails, but I don't feel strongly about it.

Let me — I'm going to start with Mr. Morris.

MR. MORRIS: If I'm —

THE COURT: Mr. Morris, I mean as plaintiff, it's appropriate to start with you. What I thought I had signed off on last Thursday afternoon was that each side would have two hours for the motions for summary judgment. And what I mean, you know, the defendants collectively would have two hours and the plaintiff would have two hours, with plaintiff reserving some of their two hours for rebuttal. But then I thought we were carving up where the plaintiff's motion to strike, there will be 30 minutes each, and then the defendants' motions to strike, there would be 15 minutes each. So I kind of have in my brain coming out here that we were going to take it piecemeal, as Mr. Rukavina said.

Mr. Morris, what would you like to say about that?

MR. MORRIS: That's exactly my expectation and not only is that the sole communications with the Court, I've never heard of the concept that's being raised now for the first time. Not only was that my understanding, not only was that the presentation that was made to the Court to limit the time for each of the three motions, but I don't understand how you can possibly do this in the way that's being proposed. I think you need to resolve the two motions to strike before we can get to the summary judgment motions, because the determination on each of those motions is going to impact the scope of the summary

judgment argument. I just don't see how you can do it all at once. It will again allow them to inject into the summary judgment motion the very evidence that I'm seeking to exclude. I object.

MR. RUKAVINA: Your Honor, I would respectfully — Mr. Morris is right, that was our understanding, but part of that understanding was that the summary judgment motions would proceed first. I think that the Court can easily conclude, whether at the beginning or the end or under advisement, that certain evidence ought to be stricken or ought not to be stricken. Of course we'll proceed however the Court wants to proceed, but I will just respectfully suggest that they should — they should argue all their motions at once and we'll argue all our motions at once. But, again, however the Court wants to proceed.

THE COURT: Ms. Deitsch-Perez, anything to add on the point?

MS. DEITSCH-PEREZ: I don't. We're — I understand each — each person's position. It might be more useful the Court to hear everything together so it's all together in your mind. I also hear Mr. Morris' point that he had a plan and it would disrupt him to vary from the plan. So the defendants are prepared to do as Your Honor likes.

THE COURT: Okay. All right. Well, I am going to go with the plan that I thought — I thought you all had adopted. I

thought it was just sort of a question of how many minutes for each. And so what my brain needs to do is hear the motions to strike first. And, you know, that's going to affect what I'm willing to hear people talk about in the motions for summary judgment and responses. So, with that, I will hear the plaintiff's motion to strike first.

MR. MORRIS: All right. Thank you, Your Honor. Before I begin the substance of that particular motion, I would just ask Ms. Canty to put up on the screen one demonstrative exhibit. I had — I don't know if you've had a chance to see this Your Honor, but about a half an hour before the scheduled time of the hearing, I circulated to Ms. Ellison and to counsel the demonstrative exhibits that I plan on using. And I think the first one that will just really be helpful for everybody.

As Your Honor knows, we submitted yesterday a 22-page agenda for just three motions. And obviously the complexity and the paper that has undoubtedly burdened us all is necessitated by the fact that there's five separate adversary proceedings, even though they cover a host of related topics. So what we did for the convenience of the Court and for the convenience of all parties is try to put in one place kind of a list of where our evidence can be found. And so, in no particular order, I have: The motion for summary judgment; it shows you which docket number in each adversary proceeding our motion can be found; it highlights below that the three places, the three — the three

areas of evidence that we have introduced in support of the motion; Mr. Klos' declaration; there is a separate appendix. And then there's the reply appendix, which I will talk about in our motion in a bit. And, again, you've got all of the docket entries.

And I think that it was probably just a mistake that we didn't put the reply appendix in the HCMFA docket, although the reply appendix really doesn't go to HCMFA, so maybe my colleague decided not to file it there because that reply appendix is limited to the Klos declaration, which is the subject of the term note defendants' motion to strike, as well as a stipulation that's independently filed on the docket concerning the admissibility of plaintiff's exhibits.

The next item is our motion to strike. It's got my declaration with Exhibits 1 through 9. It's got an errata and it can show where the errata is. And I'll get to that; the errata really is no big deal. It's that we had highlighted a portion incorrectly. And then there is a supplemental Exhibit 10 that was also filed in connection with the motion to strike, with the plaintiff's motion to strike.

And then you've got defendant's motion to strike. You can see where our opposition and our brief are filed. Those are the docket numbers. And below that is our appendix that we filed in opposition to the defendant's motion to strike, and that's Ms. Winograd's declaration.

So I point this out, Your Honor. I guess we can go to each of these items as the motions come up, but I just wanted the Court to know that we are very cognizant of the difficulty of keeping track of where all of the evidence has been lodged. And I hope — I hope that the Court and counsel find this useful because I don't know that I got it perfect, but I tried my best. And I think it accurately reflects all of the places where our — where our evidence is lodged. So unless the Court has any questions, I'm prepared to proceed on the plaintiff's motion to strike.

THE COURT: All right. Thank you for this. If there are no comments about this, I will hear your argument.

All right.

MR. MORRIS: All right. So, Your Honor, I think that the agreement here is that on this first motion, the plaintiff's motion to strike, each side would have 30 minutes. We're the movant. I don't expect to use all 30 minutes. And whatever time remains, I'm going to just clock myself, I'll just reserve for rebuttal.

Your Honor, this motion obviously was not brought lightly. There was a long string of emails that I engaged with with my adversaries before filing the motion. If we could just put up the dec. that's associated with this motion. This motion was necessitated, from our view, because the defendants put into the evidentiary record the Pully report. The Pully report was

the subject of a motion that the defendants made that I'll talk about in a moment that was denied. And HCMFA engaged in extensive discussion about an affirmative defense that they had sought leave to — to plead, and that motion was also denied.

And so, as — as the defendants have pointed out, I woke up the next morning and I was really — I was upset and I did write an email and it did say that — I put them on notice about what was happening here because I thought it was completely improper to try to include into the record and to make arguments that had been excluded by a very specific order of the Court.

And let's be clear here. The defendants were asking the Court for permission to do something. HCMFA filed their motion for leave. It's lodged at Docket 82 on their docket. And they specific requested, quote: Leave to amend its answer to expressly deny that the notes were signed. The UCC appears to require a more express denial of signature.

So there was — there was a purpose to the motion. They wanted permission from the Court to do something and they wanted permission from the Court to do something because they knew that they needed it in order to prove, you know, one of their defenses.

I just have to point out that if you go back and you look at that pleading, —

(Tones.)

MR. MORRIS: — there's like this six — the six steps of assumptions that — that are — that they argue prove that it was all a mistake. But I just — you know we'll talk about this more on the merits, but this one just jumped out at me. Mr. Dondero never told Mr. Waterhouse that the transfer was a loan, just that the trans- — just to transfer the funds. And I have to tell you that statement, the game is over for HCMFA, because Mr. Dondero told Mr. Waterhouse to transfer the funds. What he didn't tell him, what he didn't tell Mr. Waterhouse, and there will be no dispute about this, is that the transfer was supposed to be compensation. There will be no evidence that Mr. Dondero told Mr. Waterhouse that the transfer would be compensation. This admission in this motion is the end of the game for HCMFA, and we'll talk about that more in a moment. But make no mistake, HCMFA came to this Court and they asked for permission.

The term note defendants also came to this Court and they asked for permission. They knew the deadline in the scheduling order had passed or was about to pass. I think they filed on the day that it was going to pass, and they asked this Court for permission. And they said: Please, can you extend the deadline so that I can commission a report and engage in expert discovery. And, —

(Tones.)

MR. MORRIS: — again, no — no dispute, right, this is their pleading. They requested an extension of the deadline in

the scheduling order so that NexPoint could designate a testifying expert on the standards and duties of care under the shared services agreement. NexPoint wanted to present expert testimony on the question of whether the debtor put their head in the sand, in violation of any affirmative duty or obligation they may have about the matter. They asked the Court for permission.

Twice my client invested a meaningful sum of money to pay my firm to defend these motions. Your Honor took the time to hear these motions. We actually had an evidentiary hearing on the motion for leave. I cross-examined Mr. Sauter for two hours on that. We had an extensive argument on the motion to extend the expert discovery deadlines and the expert disclosure deadlines. And following both hearings, the Court entered orders denying the motion.

Now from my perspective, the matter was closed. They could not assert the affirmative defense that they asked the Court to assert because they made a motion and they lost. Now I understand, I read in their papers it was all out of an abundance of caution: We don't even think we needed to make it. It's just an element of their case. Nonsense.

The fact of the matter is, Your Honor, if you look at the next slide, go back to the spring of 2021, Mr. Sauter did his investigation, they came to Your Honor with the first motion for leave to amend, and Mr. Sauter swore — a lawyer — Mr. Sauter

swore under oath multiple times that Frank Waterhouse signed the notes. And we've highlighted just a few of them here.

Paragraph 22: The notes were signed by mistake by Waterhouse without authority from HCMFA. Paragraph 29: Waterhouse was the chief financial officer of both the debtor and HCMFA at the time he signed the notes. 30: Waterhouse made a mistake in preparing and signing the notes. 32: HCMFA now believes that it has affirmative defenses to the notes in the nature of mutual mistake, lack of consideration, and no proper authority of Waterhouse to sign the notes.

Now, mind you, this declaration is submitted after Mr. Sauter engages in an investigation to determine the origin of the notes. He interviewed Mr. Waterhouse three times. And at no time did Mr. Waterhouse say, 'I don't know what you're talking about. I don't know where these notes came from.' In fact, we know from the hearing, he said just the opposite. He told Mr. Sauter, although it's not in his declaration, nor was it in his second declaration, he specifically told Mr. Sauter: The notes were prepared for a very specific purpose; they were prepared because the auditors needed them. That was the testimony, so the notion that they had always been doing this or that they were just arguing in the alternative, they never argued in the alternative.

This statement right here on the screen is the —

(Tones.)

MR. MORRIS: — admission by HCMFA that Mr. Waterhouse signed the notes, and we relied on that admission. Right? That admission right there, this is their words, not mine. It's their lawyer, not ours. It's under oath and it was done for the express purpose of trying to persuade the Court that it should be entitled to amend its pleading, where it had no affirmative defenses previously, to assert this affirmative defense. That's where we were.

As soon as I saw what they did and included the Pully report and included extensive argument about the affirmative defense that why had excluded, I immediately wrote to them. And, let's be clear, there's only two possible things that are going on here, only two possible things: One, they wanted to make sure that they preserved their — their position for appeal, okay? No problem with that.

The second is that they were trying to get into the record, for appellate purposes, evidence and arguments that had been excluded. And that's where I drew the line. They take issue with my decision not to accept their stipulation, but I don't know what lawyer in the world would have accepted their stipulation. To accept their stipulation would have been to give them what they wanted, and that is not to preserve the issue for appeal but to introduce into evidence for purposes of the record on appeal an expert report that was excluded and an affirmative defense that was excluded.

I did make my own offer to kind of test what their motivations were, and it's in the record, it's in that email. And I specifically said: Look, if your concern is preserving the issue for appeal, I'm happy to stipulate to that. It wasn't much of a give, Your Honor, to be honest with you. Why? Because they appealed both orders. Both orders are subject to appeal, so there can be no argument today that the purpose of including this stuff in the record was to preserve their appellate rights. The appeals have already been made, so what they're trying to do is get into the record now what Your Honor specifically excluded.

What do they say in response to our motion? It's pretty simple: It's just a proffer. Proffers are permitted. Proffers are even permitted in summary judgment motions. Your Honor, I will stipulate to both. They should not waste any time trying to convince the Court that proffers are acceptable or that proffers are acceptable in summary judgment motions. What they should be trying to do, what they can't do, is — is argue that a proffer of evidence and arguments that have previously been excluded by Court order can be entered I opposition to summary judgment. No case has ever held that. They don't cite to any case for that, okay. That's why we made our motion, because we think it's patently unfair for them to put this stuff into the record now. And I will say that I took —

(Tones.)

MR. MORRIS: — the time to read their cases and their cases actually support us, they don't support them. If you take a look at just two of them, I think the two most important cases are Fusco and Walden (phonetics). And in both cases, they didn't involve summary judgment. They involve motions in limine. And what they basically said is: Look, if you make a proffer in the context of a motion in limine and the proffer is denied, your issue is preserved. And, in fact, the Fusco court specifically said: In many cases the grant of the prior motion in limine — here it was a motion to exclude evidence — would make it improper to call such witnesses without prior permission. All the proponent could do would be to line up the witnesses at trial and then ask permission.

The defendants here didn't ask for permission. In fact, they did ask for permission and they were told no. And instead they just put this stuff in the record. And, no matter what I said, they wouldn't back down.

I liken this, Your Honor: Parent and child. Bear with me for just a moment. A child comes to a parent and says, 'May I have a cookie?' And the parent says — the parent says to the child, 'You can have a cookie after dinner. You can have a cookie during dessert. That's the time to have a cookie.' And they sit down for dinner and they have dinner. Dessert comes. Parent puts the plate of cookies on the table. The child doesn't eat any. Two hours later, —

(Tones.)

MR. MORRIS: — the parent is putting the child to bed. And the child says, 'May I have a cookie now?' And the parent says, 'No, the time for having a cookie was at dessert. You knew what the schedule was. You knew what the timing was. You can't have a cookie now. It's too late.'

So child goes to bed. Parent takes the child to school the next morning. Parent comes home, goes into the child's room, and there's crumbs everywhere in the bed. Child comes home. Parent says, 'I told you you couldn't have a cookie. What are you doing?' And the child says, 'You told me I couldn't have a cookie, but you didn't tell me I couldn't have the round thing made of dough with chocolate chips.' That is exactly what the defendants are saying here. That's the totality of their response, Your Honor.

Their response is that your order denying these motions didn't specifically say that they could proffer evidence. All they said is that they — I'll leave it to them. I'd like to know what they think the orders meant. That somehow we went through that whole process and they could just put into evidence and make arguments about matters that this Court said no. You told them the time for doing all of this has passed. You told them you can't have a cookie, but they ate it anyway.

This is substantial prejudice to Highland and it's why — it's why this motion had to be heard before the summary

judgment motion. They want to argue to you now the Pull report even though they know I didn't have a chance to depose Mr. Pully. They want to argue their affirmative defense that they didn't raise even though they made the motion and they lost because they know I didn't have a chance to take any discovery on this type of defense because they had said until they made their motion that Mr. Waterhouse signed the notes by mistake authority (phonetic). That's the case I was trying, until we got this motion.

So it would be severely prejudicial, and that's the point. And the interesting thing is, Your Honor, if we could go to the next slide, I just want to conclude by raising a number of questions that I just don't see — unless they answer these questions, I probably won't even have a rebuttal here. Okay, how is it that Highland is worse off having won the motion. If hold didn't oppose the motion, we wouldn't have spent any money, the Court wouldn't have been burdened, and I would have been able to take discovery of Mr. Pully and on the affirmative defense. Had I argued the motion and lost, at least I would have had the opportunity to take discovery. And I would have had the opportunity to take discovery of both Mr. Pully and on this defense. But instead I won the motion, so I'm worse off. And now I'm supposed to deal with the summary judgment argument on evidence and arguments that have been excluded that I haven't taken discovery on it.

I would like to know from the defendants how it is that my position is worse having won the motions. I'd also like to know how come they don't address prejudice at all. How come — and it's not like I haven't raised the issue. If you look at my last email to Mr. Aigen, I had a laundry list of reasons why I thought this was improper. They didn't respond to that at all.

In our motion, we gave a laundry list of reasons why we're prejudiced here. They didn't — maybe I missed it. Maybe they'll point out that I missed it. It's possible. But I don't recall seeing anything in any of the papers that said why this is proper and why the prejudice to Highland isn't what I say it is.

I'd also like to know if the orders don't prohibit a proffer on summary judgment, what exactly do the orders prohibit? If we didn't move for summary judgment, would the defendants have been permitted to enter the Pully report into evidence and pursue a new defense without having the orders reversed? Think about that.

If we didn't make the motion for summary judgment, where would we be left? Would they be able to do what they've done now? How does their position improve because we've made a motion for summary judgment?

Number five, if as HCMFA contends it always asserted that Highland didn't sign the notes, — that's a mistake on my

part — if it contends that it always asserted that Highland didn't sign the notes and that HCMFA is only challenging an element of Highland's claim, then why did they make the motion? Why did the burden me and my client and the Court with this motion if there was no need for it?

There was a need for it, and just look at paragraph 1 of their motion. There was a need for it. They knew there was a need for it. They didn't plead in the alternative. HCMFA will never present a pleading to this Court where they asserted that they didn't sign the note. In fact, Mr. Sauter's sworn representations to you are the exact opposite.

And, finally, I just leave them with this question, because I didn't see it in their brief: Identify one case anywhere in the United States of America where a court has permitted a party opposing summary judgment to proffer evidence and pursue defenses that were excluded by very explicit, explicit prior Court orders following full hearings on the merits?

Unless Your Honor has any questions, — you know, let me just say my goal in life is not to hold lawyers in contempt of court, my goal in life is not to obtain sanctions, my goal in life is to try cases fairly, and this is not fair. It's just not fair. It's not consistent with any law. And it does violate not just the two orders that Your Honor entered but the scheduling order. And so under Rule 12, under Rule 32, under

the rules of contempt that Your Honor is familiar with, the most important thing to me is to keep this stuff out of the record.

At some point people have to be held accountable for this kind of conduct, but I leave that to the Court's discretion. Unless the Court has any questions, I'm going to reserve my 12 minutes for rebuttal.

THE COURT: Okay. Thank you.

All right. Mr. Rukavina.

MR. RUKAVINA: Your Honor, Ms. Deitsch-Perez will handle half of our response and I'll handle the second half.

MR. MORRIS: Okay.

MS. DEITSCH-PEREZ: It's —

MR. RUKAVINA: I apologize. No, I apologize. Not Ms. Deitsch-Perez, her partner.

MS. DEITSCH-PEREZ: Okay. Mr. Root will argue.

THE COURT: Okay, Mr. Root.

MR. ROOT: Thank you, Your Honor. This is my first time having the privilege of appearing before you. Ms. Deitsch-Perez brought me into this case to assist on this motion I think because I am the co-chair of our firm's appellate practice group, and the ways in which arguments are preserved for appeal are important to me professionally and they're important to of course all our firm's clients and I do have a little bit of insight that I have earned from my experience in that area on how these kinds of pitfalls can emerge.

I'm going to address in my argument the portion of the motion that's addressed to the Pully report and Mr. Rukavina is going to address the affirmative defense issue.

And, with respect to the Pully report, it's a bit curious to me because the nature of the conduct was clear at all times. It was clear in the filing to the Court. It was clear in discussions with Mr. Morris as to what was being done. The Pully report, — let me see if I can get this PowerPoint up — I'll share it with the Court. I'm not that adept at this and so I hope I've got this right.

Can everyone see this?

THE COURT: Yes.

MR. ROOT: Okay, great. And, you know, one of the things where Mr. Morris began is with the multiplicity of actions here. There are multiple actions with multiple defendants that are adversary proceedings that are postconfirmation in bankruptcy court. And, ultimately, the case — the case is against — these defendants are going to be resolved by a jury trial at the district court. And that's an important distinction to consider as you think through the issues raised by the plaintiff's motion to strike.

You know, overall the plaintiff has not proved the defendants or their counsel violated the express terms of any order of this Court. You know, with respect to the Pully report, there is no burden to the plaintiff or this Court from

the use of a proffer. And the rules that plaintiff relies upon do not authorize their motion to strike, sanctions, or a finding of contempt.

Neither the order denying the extension of the expert witness deadline nor their order denying assertion of affirmative defense, the Court should make any ruling on admissibility of evidence at trial or for summary judgment. This Court's order did not expressly bar the defendants from offering the Pully report as a proffer to complete the summary judgment record, which ultimately should this Court make a conclusion adverse to either side, I assume there will be objections to the report and recommendation that go to the district court. And, ultimately, the dispositive motions are going to be decided by the district court in the end, not this Court. This Court will make a report and recommendation on the motions that are heard today, but under the divisions of jurisdictions in cases like this, any final decision is subject to review in the district court. And that's important because the presence or absence of materials or arguments in the summary judgment record will matter to the completeness of the record at the district court.

Before I show you the precise conduct with regard to the Pully report that's alleged to be in violation, I want to make sure we all are oriented correctly to the standards in the Fifth Circuit for contempt. When a lawyer seeks contempt from a

court against other lawyers and other parties, it's a very serious thing to do. And it's only warranted when someone violates an order of a court requiring specific and definite language that person do or refrain from doing an act. That hasn't happened here.

The orders here denied leave to amend the complaint to add a new or a different affirmative defense and they denied the extension of the date for expert designations in the case. They did not expressly prohibit a proffer for the purposes of preserving the evidence on appeal, which are important purposes.

And so let's look at exactly what the defendants did with are Pully report. There is one footnote and it is present in the appendix and this is it, right here, footnote 76. It says: Defendants' position is bolstered by the expert report of Steven J. Pully, which was incorrectly not permitted to be included in the record by the Court. Defendants submit this proffer to preserve their objection.

That's it. That's the completeness of the reliance upon the Pully report, the argument really to the Pully report. And right here it expressly acknowledges the Court's order and shows the intention of the defendants to respect the Court's order with which they disagree; that we — they have filed an appeal to the district court. And what plaintiff advised the Court about the appeal in his argument, he did not mention that in his response to the appeal he says the appeal is improper and

should not be heard by the district court. Well, then we're back here in the soup. Because if that appeal is improper and we need to do something different to preserve our objections to the exclusion of the Pully report, this is exactly what we've done. We've put it into the record and made this one footnote reference. And that's the only thing that's been done with respect to the Pully report.

And after — after that, Mr. Morris was upset, as he's candidly admitted, and he demanded that the report and the footnote be withdrawn by January 25th or face sanctions. And, you know, we advised him in our email about this was — we explicitly stated in our response that the expert order was denied and the evidence was being offered as part of an offer of proof. And we asked him for authority stating that providing such an offer of proof is improper or could be subject to contempt. He offered no authority, he responded quickly, and he demanded lateral compliance with — with his demands. Either comply with the demands or you won't, they don't need any further response.

Well, we didn't think that was adequate or sufficient exchange of information among counsel on a subject as serious as contempt. And so the next day we wrote him back and offered extensive authority regarding offers of proof, including the cases he cites to Your Honor.

You know, the — as you know, offers of proof are

typically used to permit the trial judge to reevaluate his decision in light of the evidence to be offered and to permit the reviewing court to determine to the exclusion of effective and substantial rights of the party offering it. That's Fortune Auto from the Second Circuit in 1972, "A proffer of evidence may be required if the trial judge is not well aware of the content and purpose of the evidence." Or the Tenth Circuit in the Fevrick (phonetic) case. "The court must be well aware of the substance of the evidence and the record must reflect the substance of the evidence," that's the Sheffield (phonetic) case from the Eleventh Circuit.

And the Fifth Circuit, again in Maquay (phonetic), "The proponent must show the substance of the proposed evidence and make known to the court for whatever reasons the evidence is offered." And on and on. Ample authority that this is exactly what we should be doing, particularly here where this summary judgment record is going to go to the district court on appeal, or there — and if that happens, the district court needs to have a complete record. And the complete record, from our perspective, should include the Pully report.

We acknowledge the Court's prior ruling with respect to the Pully report. We acknowledged it in the filing that the plaintiff says is contemptuous and before that all of this authority supports the decision that we made to include it in the record in the minimal way that we've done.

But we did more. We offered to stipulate, and here is an excerpt, the first excerpt from the stipulation, we offered to stipulate the bankruptcy court may disregard the Pully material in the opposition and consideration the opposition as if it did not contain any references to the Pully material until and also the deadline order is modified to allow the Pully report to be used by defendants.

That solves entirely his prejudice concerns with respect to the Pully report. Enter the stipulation, we file it with this Court, the Court disregards the Pully report, and we move on. And we have completed our record for appeal.

And that was the other thing that we asked for in the stipulation: Can we please agree that we preserved our objections, that we properly preserved any objections that we may have to the expert deadline order and that we properly preserved any objection to the exclusion of the Pully report. That's what we're — that's what we're after. That was our goal throughout.

In response to this stipulation, the plaintiff says: Oh, if your issue is preserving the issue for appeal, I'd consider a stipulation. And if you're truly concerned with reserving your right, I'll consider a stipulation.

But we sent him a stipulation that we thought was appropriate and complete and necessary. And that should have been the end of the matter. And we sent it to him the same day,

we said, you know, this is an offer of proof, please let us know if you have comments on the stipulation, and let's move forward. No prejudice, no consideration of the Pully report. Our objections are preserved.

And he says this is havoc, and endless questions, and we are insisting on ignoring Your Honor's orders. That is just not true. Throughout this correspondence we acknowledge this Court's order. And we're doing what we believe to be necessary to preserve the objections.

And it's the plaintiff's motion that's created this needless burden this morning. It manufactures expenses for which to seek sanctions. We offered to stipulate, as you've seen, that the Court could disregard the Pully report. And even in the absence of a stipulation, the Court may disregard the proffer and say, 'I'm not including it. You've — my order was the Pully report was untimely.' And there's just no authority anywhere to impose sanctions arising from circumstances like this.

I'm not going to into how the proffer was appropriate. In fact, Mr. Morris has admitted that the proffer is an appropriate way to do this. He just doesn't believe that's what we're doing. Well, the evidence is to contrary. That's all we were doing. The Fusco (phonetic) case, which he relies upon, does not support their position. An adequate and complete pretrial proffer will preserve the record.

In this case, with the multiplicity of matters, where the Pully report was only informally injected into one of them, in order to make sure the district court had a complete record, we included the Pully report in the appendix. That's what we did. That's why we did it. And, you know, anything otherwise is just contrary to the evidence and the facts.

Rule 37 just addresses failures to make disclosures or cooperate in discovery; those matters are not at issue here. And we acknowledge this Court's order and are willing to abide by it and have offered to stipulate in a way that is clear and would remove all prejudice from the defendants.

And if this Court were to strike the record, we — it would needlessly complicate the record on appeal. I have dealt with this situation where in an appellate context a motion to strike below is granted and the evidence that was stricken was sought to be, you know, advanced as part of the argument about the motion to strike, and often my adversaries will say, no, you can't include that stricken evidence in the appendix because the district court struck the evidence and, therefore, it shouldn't be part of the record on appeal. We're trying to avoid those kinds of fights. There are enough disputes in this matter. And the easiest and best way to do this is to deny the motion for sanctions and move forward to the merits.

The Pully report merely completes the record. And at this point I'm going to pass, unless the Court has questions, to

Mr. Rukavina to address the affirmative defense issues.

THE COURT: Okay. Here — here is my question and it goes to Mr. Morris' point that he's worse off for having won the motion to extend time to file the Pully report. So let me give you a hypo and you tell me if I'm wrong in thinking this is a scenario that could play out. So —

MR. ROOT: Sure.

THE COURT: — let's assume I deny the motion to strike, okay, and it gets in the record for the limited purpose of, you know, preserving it for appeal. And let's also assume I end up making a report and recommendation to the district court that it grant the motion for a partial summary judgment.

And, then meanwhile, while that's sitting out there on the district judge's bench or desk, the district court reverses my earlier decision to extend the deadline — I should have extended, I should have let the Pully report come in. Then the district court later gets off its desk my report and recommendation, and it considers the Pully report, okay, because it's reversed my earlier decision. Isn't it true that the plaintiff never would have gotten its chance to take discovery and maybe present refuting evidence on the motion for summary judgment?

MR. ROOT: Yes. So in the hypothetical, Judge Jernigan, I think it's really where — where I know that plaintiff will have their opportunity is in the context of the

briefing around the objections to a recommendation on summary judgment. I am confident Mr. Morris would advise the district court, 'If you are going to consider the Pully report, I need an opportunity to take more evidence,' which could happen. If the district court — you know if the district court concludes Your Honor was incorrect on the extension of the deadline with respect to this report, I don't want to prejudge what will need to happen next, but a natural thing to happen next would be to provide Mr. Morris an opportunity to take a deposition of Mr. Pully and develop any kind of rebuttal evidence that he thought was necessary.

I don't know what all that's — you know, I don't — I don't know what path that's going to take. I can't prejudge, I don't know. And where we are right now is, is it possible the district court relies on the Pully report and the summary judgment record? Hypothetically, yes. But I just know, from even my short time on the case, that Mr. Morris will object strenuously to that. And — and, from our side, we would not object to Mr. Morris taking discovery — taking expert discovery on the Pully report. Where we are right now, the Pully report shouldn't be considered, we acknowledge that. That's Your Honor's order which we disagree with but respect. But in order to complete the record on this summary judgment motion, we have included it. In the event that as this case progresses and the various appeals progress, allow for it to be considered. And

whether and when that happens and the circumstances and opportunities that will generate for Mr. Morris are as yet unknown.

THE COURT: All right.

MR. ROOT: But that's where we are. And I don't think he's worse off from us including it in the record because we have admitted to the Court and to him that it need not be considered as part of the summary judgment in this proceeding in front of Your Honor.

MS. DEITSCH-PEREZ: And, Your Honor, if it helps, we would represent that if Mr. Morris — if the district court did as Your Honor hypothesized, we would not object to Mr. Morris taking Mr. Pully's deposition and we would not object if Mr. Morris thereafter said we need to get a rebuttal expert, and then we would take rebuttal expert's deposition, and it would all be included, so we would stand by that. Thank you.

THE COURT: All right. Mr. Rukavina.

MR. RUKAVINA: Thank you, Your Honor.

Mr. Vasek, if you will please pull up my PowerPoint.

So the facts and circumstances of the failure to sign is a little bit different.

Mr. Vasek, the first page, please. Scroll down now to the next page and the next page.

So the time line here, Your Honor, is important. And I know that the Court prepares her own time line, so we can

ignore the top half. That goes to the merits.

But on January 22nd, Highland filed its complaint. Marc 1, we answer. May 22, we file a motion for leave to assert a mutual mistake and that Mr. Waterhouse was not authorized to sign the notes. Now that's important because the Court granted that motion for leave, and we ended up on July 6 filing our amended answer. Your Honor has that amended answer at Docket 48. Twice in there, we expressly state the defendant did not authorize Waterhouse to sign the notes or to bind the defendant.

So — so that's — so that was our live pleading, that the defendant did not authorize Waterhouse to sign the note. This is — this is important because now we have to cross-reference to the UCC. And, Your Honor, we briefed the UCC, it's on page 11 of my opposition brief. And the UCC says: If the validity of a signature is denied in the pleading, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic.

So this now put me in a very interesting position, and there is no case law on this. We clearly denied the validity of the signature. We said Waterhouse wasn't authorized, he wasn't our representative. He didn't have any authority to sign it. But we did not deny the fact of his signature because, as Mr. Morris pointed out our prior investigation, Mr. Sauter asked Mr. Waterhouse and Mr. Waterhouse just flippantly said, 'Well, if it's got my signature, it's my signature.'

So — so going back to the time line, on May 28th we serve our requests for production and on June the 28th, Highland responds.

Mr. Vasek, if you will please pull up the — the appropriate RFP.

So you see, Your Honor, there on number 9 we ask for all Microsoft Word copies of the notes, including meta data. So the debtor first objects to the term meta data as vague, which I find inconceivable that a trial lawyer wouldn't know what that means, but then it says: Subject to the objection, to debtor will conduct a reasonable search for and produce responsive documents.

So that's the response that I get. And I'm now led to believe from this response that they're going to look for the originals and they'll produce the originals, maybe not meta data, but they will produce the originals.

If we go back to the time line, Mr. Vasek, please.

Months go by, Your Honor, and the debtor does not produce the originals. I ask about it a couple of times and I get no real response. On October the 19th, as we are deposing Mr. Waterhouse, the man who purportedly signed the notes, Ms. Deitsch-Perez expressly asked Mr. Morris, "Are you going to produce the originals," and he says no, doesn't give any response or reasoning. He says no.

After that, Mr. Morris and I have a few discussions

and the debtor does agree to produce the originals. They're produced on October the 25th, right before I depose Ms. Hendrix (phonetic). At that point in time, it became clear that Mr. Waterhouse did not sign the notes. That is a fact. Ms. Hendrix took copied images, JPGs of his signature and she affixed them to the notes. Maybe Mr. Waterhouse authorized it, maybe he didn't, there's conflicting evidence on that, but the simple fact is that Mr. Waterhouse did not sign those notes.

We promptly file our second motion to amend and this Court denies the second motion to amend. I will admit that I was surprised that the Court seemed not to take any issue with the discovery gains or at least what I thought was a discovery gain, especially when Mr. Morris' response was, 'Well, Mr. Rukavina, you could have issued a new — should have moved to compel me.' But the Court denied the motion.

Go to the next slide, please. And go to the next slide, please. And go to the next slide, please. And go to the next slide. And to the next slide.

Okay. So — so where are we now? We know as a fact that Waterhouse did not sign the notes. We know that — that we would have known this earlier had the debtor produced the originals.

I'd also like to remind Your Honor respectfully that when we were discussing reference withdrawal, I argued both before this Court and the district court that the reference

should be withdrawn immediately to avoid a bifurcated proceeding, to avoid a procedurally-confusing proceeding where I really have two courts now addressing the same issues.

When we filed the second motion to admit, we did not admit that leave was necessary. In fact, we expressly pointed out that the UCC is confusing and we filed a second motion for leave out of an abundance of caution. Also very important, no court has ruled whether the failure to sign is an affirmative defense or not. This Court did not address that issue or rule on it when it denied my Rule 15 motion and the district court hasn't ruled on it. And, honestly, there is no case law on that. But we do know that Texas law permits the general denial, so I believe that the correct way to harmonize is that the failure to sign is not an affirmative defense, but it needs to be denied or, rather, the validity needs to be denied in that UCC section that we mentioned.

So now we have the summary judgment motion. We have no definitive ruling on whether my defense is an affirmative defense or not. And — and in my response, I expressly state, I expressly referenced this Court's prior denial of the Rule 15 motion. I'm not trying to hide it. In the meantime, on or about January the 23rd, we filed not an appeal with Judge Starr but a motion to reconsider, because, pursuant to the rules governing magistrates, which this Court has said she's acting as a magistrate, you have 14 days to move the district court to

reconsider. So that's all that we did.

But I think most importantly, Highland itself in its motion raised the signature issue. This is from their own brief. Highland states that Highland must establish that the nonmovant signed the note. Highland raised that issue. And Highland introduced evidence, which I submit is false evidence, that my client signed the notes. It's in our brief, but Highland's — Highland's motion and brief state that the demand notes are valid, signed by HCMFA, and they reference Mr. Klos' declaration. Mr. Klos' declaration begins with, "This declaration is based on my personal knowledge."

Next slide, please, Mr. Vasek.

But at deposition, Mr. Klos said, "I asked Ms. Hendrix to prepare a note." I asked him, "Did you have anything more to do with papering, preparation, or execution," and he says, "Not that I can remember."

I ask him, "Would you have had any role in either or both of the notes actually being signed by ink or electronically," he says, "Likely not, no."

So where is his personal knowledge from? So, Your Honor, the facts here — this is an unfortunate motion, it's unfortunate that I'm facing contempt for the first time ever in my life because all I told was the truth, that Mr. Waterhouse didn't sign the note. Highland seeks contempt over something that it — that is its fault because it did not timely produce

documents. Highland seeks contempt over something that it raised in its motion for summary judgment, based on what I suggest is false or misleading evidence. And Highland seeks contempt when all I'm trying to do is preserve my client's rights before the district court, because what has to be remembered is that my only remedy after this Court issues a report and recommendation is to object. I cannot introduce new facts. I cannot file a motion for de novo — or, I'm sorry — a motion to reopen the record. All I can do object. So if I do not respond to something that Highland raises, then my client is prejudiced. Yet we have absolute facts that Mr. Waterhouse didn't sign the notes.

Go to the next slide, please.

So, in conclusion, Your Honor, on the contempt issue, as a matter of law, no order prohibited me from making this argument or presenting any evidence. The denial of the Rule 15 motion was just that, a denial of the motion. There is no specific order requiring my client or me to perform or refrain from performing in a particular way. Nor did I violate the spirit of that order. It is absolutely easy and cheap for this Court to now report and recommend that this was an affirmative defense that was waived by the failure to timely assert it. This does not require complicated briefing. This Court can recommend how it wants to go the district court. There's no prejudice.

Mr. Morris' representations about discovery, it's patently false. Mr. Waterhouse was deposed. Ms. Hendrix were deposed. We all asked them questions on these issues. There is no need to redepose them again, but if they want to redepose them again, fine, I'll pay for it. So there's no — there is no prejudice by a lack of discovery. And, again, they caused this issue by not producing the original notes.

Rule 12 and 37 don't apply, just as Mr. Root stated. I also submit that the Court does not have core jurisdiction over contempt. And I believe Your Honor should not strike these arguments and strike this evidence because the Court cannot decide what the district court gets to hear and gets to consider. That is a constitutional problem. All that this Court can do is report and recommend. And if the Court finds it appropriate to report and recommend that this defense should not be considered because it's an affirmative defense that was waived, then that is Your Honor's decision, but I will still then have my right to raise the issue and argue it in front of the district court, which will ultimately decide these issues.

So, Your Honor, I think respectfully in the last 20 years or so, our practice has become much more bitter — you can close this, Mr. Vasek — it's become much more adversarial, and there is just no need for it, in what is a cold promissory note case, we gave — we offered stipulations, we offered to preserve everyone's rights, and I cannot believe that I am now looking at

contempt, as is my client, because all that we did was to tell the truth in response to Highland's own allegation. Thank you.

THE COURT: All right. Rebuttal, Mr. Morris. You've got 12 minutes.

MR. MORRIS: I do. Let me just take a moment to set my clock.

Interestingly, Your Honor, I don't believe that they answered any of the questions that I posed, but I'm going to respond nevertheless.

Mr. Root, nice to meet you. Welcome to Highland.

I just want to respond to a couple of comments that he made. He raised the issue of a jury trial. Obviously that's irrelevant here. This is a motion for summary judgment. Your Honor is going to make a report and recommendation. It's going to go to the district court and the district court is going to decide the issue. So this is not about a jury trial, this is about a bench trial, until we get to the jury.

Number two, you know both he and Mr. Rukavina dance around your orders and what the motions were about. They're telling you that you didn't tell them that they couldn't have that round thing made of dough with chocolate chips, you just told them that they couldn't have a cookie. I don't get it. For the life of me, I don't get it.

With all due respect to Mr. Root, we know well how serious contempt motions are.

(Tones.)

MR. MORRIS: We've had a couple of them here. We briefed them extensively. The Court is intimately familiar with the standards for contempt. There was an order, they knew about the order, and they breached it. It's really not more complicated than that.

He tries to minimize, Mr. Root tried to minimize what they've done here, but it goes back to what I said in the beginning, and that is there could only be two reasons for doing this. One is because you wanted to preserve the appellate right and the other is to sneak this into evidence for purposes of the record. And he basically admitted that's what they're trying to do. He pointed to footnote 76, he put it up on the screen. And he said, 'Gosh, all we did was say, you know, there's something on there. We didn't even make any arguments.' They don't care about you, Your Honor. They don't care about this proceeding. Their eyes are on Judge Starr in the district court, and what they want to be able to do is get this into the record now so they can make their arguments then, and that's the prejudice.

The notion that somehow they're graciously willing to give me the opportunity to do discovery later on, that was what their motion was about. Their motion was to extend an order of this Court to allow them to participate in expert discovery. They made their motion and they lost, and now they say the remedy is to just do what they were told they can't do. Round

thing made of dough with chocolate chips, but then a cookie.

The stipulation. Mr. Root spent a lot of time on the stipulation. Again, I would have been perfectly fine, and I'm willing to do it right now, if they withdraw the Pully report — and let me be clear — if they withdraw the Pully report and the arguments related to the barred defense, I will stipulate right now on the record that those issues are preserved for appeal, because they presented them to Your Honor, they asked Your Honor to do something, they made a motion, they asked Your Honor, 'Please make a ruling,' now they say it's somehow unconstitutional. Nobody forced them to do it, what they chose to do. And Your Honor entered rulings. And now somehow, because I wouldn't agree to do what they couldn't get you to allow them to do, I'm the bad guy. Again, my offer remains: If the issue is preservation of appeal, withdraw the Pully report, withdraw the affirmative defense, and I stipulate those issues are preserved for appeal. They are already subject of appeal. There's a mention of it's not an appeal, it's a motion for reconsideration. In my life I've never heard of a motion for reconsideration being made in any court other than the court that issued the order. But, be that as it may, it is what it is. That's Mr. Root.

Mr. Rukavina spent most of his time arguing yet again the merits. He said that Mr. — Mr. Waterhouse flippantly said that he signed the notes. I don't want to spend too much time

on the merits, Your Honor, but remember Mr. Sauter's cross-examination on this very motion. Mr. Waterhouse didn't flippantly say anything. What he did is he told Mr. Sauter in very clear and unequivocal terms that he knew about the notes and that the notes were prepared for a very specific purpose. That's not flippant. It wasn't disclosed to you, but it certainly wasn't flippant on Mr. Waterhouse's side.

And remember, because Mr. Waterhouse has never denied the existence of the notes, I don't know why they're pressuring Mr. Waterhouse like this. It's sad to me. But they are destroying the man. And why are they destroying the man? Because if they're right and this note was somehow done without Frank's authority, then — then Mr. Waterhouse and Mr. Dondero, by the way, made enormous and grievous mistakes in their representations to the auditors in the dozens of filings in this bankruptcy case that the creditors committee relied upon. Mr. Waterhouse prepared every single monthly operating report. So Mr. Waterhouse didn't just make a mistake with respect to these notes, he made dozens of mistakes. I — they're putting the guy under — under the bus. That's on them.

Mr. Rukavina says that he served a discovery request and we said we'd produce it and that he asked about it a couple of times, the record is clear Mr. Rukavina remained silent for many, many months. Never followed up. And while I admit that upon receiving the first follow-up request in the later half of

October about this matter, I said no. The fact is I produced it within 10 days. I produced everything within 10 days of the follow-up request. It is not the first time in litigation and it's certainly not the first time in this case that follow-up document productions occurred. Within 10 days of the follow-up request, they had everything they wanted.

Of course they never answer why they didn't do the investigation in May of 2019, when Mr. Dondero was fully in control, and then the notes are actually described in the audited financial statements, but we'll save that for a bit.

And Mr. Rukavina complains that there's two courts. Woe is me. Happens every single day. There's magistrate judges, there's — there's reports and recommendations. Your Honor knows better than I do, better than anybody on this — on this hearing how these matters work. There is nothing unusual about it. They made a motion, they lost, and now they're ignoring it. And for those reasons, Your Honor, we know that this — the Pully report should be stricken, they should not have an opportunity to make arguments in the district court. What they should be able to do and what I will stipulate that they can do is appeal the order.

And they can appeal the order. I mean I don't know if the time has passed, frankly, so I don't — I don't want to open the door to something that may have already been closed. But the fact of the matter is they should go to Judge Starr and they

should explain to Judge Starr why you got it wrong. They shouldn't be allowed to make me sit in an absolutely worst place than I would have been had I not opposed the motion or had I lost, because that is where we are. And I don't care how gratuitous they are in saying, 'You could take discovery.' I had that option last fall and they didn't want to do it. They can't force it on me now.

Unless Your Honor has any questions, I've got nothing further.

THE COURT: Just one. Just refresh my memory. I have the memory of a very lengthy hearing on the Rule 15 motion to amend. And I guess it was the same day the motion to extend time to add Pully as an expert. Mr. Sauter testified — was it Mr. Sauter? I'm thinking —

MR. MORRIS: It was — it was Mr. Sauter. I'm sorry to interrupt, Your Honor, but just to be clear.

THE COURT: Yeah.

MR. MORRIS: Mr. Sauter is the attorney who —

THE COURT: Right.

MR. MORRIS: — submitted the declaration in connection with the first motion for leave to amend.

THE COURT: Okay.

MR. MORRIS: The attorney who submitted the declaration in support of the second motion for leave to amend. And I did cross-examine him at length about, among other things,

his conversations with Mr. Waterhouse —

THE COURT: Waterhouse.

MR. MORRIS: — where I brought out that Mr. Waterhouse specifically told him why the notes were prepared.

THE COURT: Okay. But that's what I thought I remember —

MR. ROOT: Just to —

THE COURT: — but what I wanted to clarify, Waterhouse was not a witness that day. He —

MR. MORRIS: Correct.

THE COURT: — he didn't submit a declaration at any time in connection with this litigation, correct?

MR. MORRIS: The only statement that we have from Mr. Waterhouse is the singular deposition.

THE COURT: Okay. All right. Was someone else wanting to respond —

MR. ROOT: And, just to be clear, —

THE COURT: Um-hum.

MR. ROOT: — and, just to be clear, Your Honor, at the — I believe the transcript on the motion to extend the expert discovery deadline, and there were no witnesses at that hearing, it was a separate hearing.

THE COURT: Okay.

MR. RUKAVINA: Yeah, agreed. Mr. Root is correct, Your Honor, the hearings were maybe a month apart.

THE COURT: Okay.

MR. RUKAVINA: And I just want to refresh Your Honor's memory, if I may refresh Your Honor's memory that at the beginning of the Rule 15 hearing I had argued that under the Local Rules that live testimony was inappropriate and that we were limited to our respective appendices, Your Honor overruled that objection. Otherwise Mr. Waterhouse would have been subpoenaed to be there.

MR. MORRIS: Your Honor, I —

THE COURT: Say again.

MR. MORRIS: — I just —

THE COURT: You — you did not want witnesses —

MR. MORRIS: — just —

THE COURT: I said, yes, witnesses were allowed. And then you say you would have subpoenaed him if you knew how I was going to rule; is that what I just heard?

MR. RUKAVINA: No, Your Honor. No, Your Honor, that's — that's — I didn't know how Your Honor was going to rule. We have the transcript if the Court questions my memory. I had argued that under the Local Rules and our practices, when you have an adversary proceeding in the motion, that you are limited, both sides are limited to the evidence in their appendices. Mr. Morris disagreed with that. He had subpoenaed Mr. Sauter. And the Court said, no, you're allowed to call witnesses at this hearing.

What I'm telling Your Honor is if I had known that it was going to be a live hearing with live witnesses, instead of relying on what I thought was the Local Rule, then we would have subpoenaed Mr. Waterhouse. He was not there because we're trying to hide him or anyone is trying to him.

MR. MORRIS: Your Honor, just to be very clear as to what happened, I didn't — I served a subpoena on the person who submitted a declaration in support of the motion. I didn't call any other witnesses, okay, so and I think that that was the substance of Your Honor's ruling, was that if you — if you want to submit a declaration, you have to put — you know when somebody wants to cross-examine, you have to be able to do that. And that's all I did.

THE COURT: Okay. All right. Well, I'm going to grant the motion to strike, but I am going to deny a request to issue a contempt order or to impose any sanctions. I find the latter somewhat of a close call, I will tell you all. But if it's a close call on something as serious as contempt or sanctions, I think the better exercise of discretion is not to order contempt or sanctions. And let me be clear about a couple of things.

I feel like what we have had here has sounded a whole lot like the defendants rearguing motions that I've earlier denied. You know as I recall, and it's been a few weeks, with regard to the Steven Pully report, you know I had no doubt about

his stellar credentials or anything like that, I simply thought not only was it too late in the game but this was not a proper subject matter for expert testimony as I understood the nature of what he was potentially going to be added for. And I do agree very much with Mr. Morris' argument that he's worse off than had he not won the motion earlier, because it will be there in the record and maybe he won't end up having a chance to depose or put on his own refuting evidence.

You know I gave one hypo, and the defendant lawyer said, oh, we would agree, you know, to reopen discovery or whatnot. You know I'm also worried about a district court staff who has stacks and stacks of papers who, just like I and my staff, sometimes have troubling keeping up with what's in the record and what's not. You know they may look at it inadvertently in the scenario that they deny the motion for reconsideration that has been filed by the defendant. So this must be stricken.

And then with regard to the new defense that was attempted of Waterhouse did not personally, physically sign the notes, again I feel like we've had a reargument of my Court's denial of the Rule 15 motion to amend here today, but let me be clear. You know we always say context matters. And when this Court denied the Rule 15 motion, you know more often than not certainly this Court gives leave to amend in a Rule 15 context, but the Court did not view this as any run-of-the-mill Rule 15

motion. We had, here's the context: Notes that I think in the aggregate two HCMFA notes that were 7.6, $7.7 million that were executed or not on May 2nd and May 3rd, 2019, just five months before the bankruptcy. It seemed, I'll be blunt, not remotely credible what was being urged here at the eleventh hour, or many, many months into the litigation, that an individual who was CFO of Highland and I guess treasurer, I think that was his title, with HCMFA, that he had not from the get-go, when he was totally accessible to the defendants for many months, because he now works in the Skyview new startup of former Highland employees, it just seemed inconceivable that this late in the game suddenly there was a new-found 'Oh, he didn't sign the notes,' it just did not seem remotely true to the Court, based on what was put before me at that hearing. So I was not going to allow a late-in-the-game Rule 15 amendment when I absolutely did not find the evidence credible to support the motion.

So I am going to grant the motion to strike any references to this defense of Waterhouse did not actually just sign the notes. So, again, I'm denying any sanctions. I'm going to take the defendants at their word that they were somehow needing to do this to preserve the record on appeal but they've got other ways of preserving and I'm not letting this in the record.

Mr. Morris, I am going to ask you to upload an order that needs to be specific. I mean I know it's easy to carve out

the Pully report, but as far as any and all references to the Waterhouse-did-not-sign-the-notes defense, I would prefer for you to sift through and put in the order where those are so the record is just —

MR. MORRIS: Your Honor, if I may, we've already done that, and I think attached to my declaration in support of the motion to strike, which —

THE COURT: Okay.

MR. MORRIS: — just as one example, could be found at the HCMFA Docket 131. We already highlighted the portions of the pleadings that we thought ought to be stricken as amended by the errata that was —

THE COURT: Oh, that's —

MR. MORRIS: — filed at Docket 141.

THE COURT: That's —

MR. MORRIS: That's what the errata is, because I made a mistake, so we corrected that.

THE COURT: Okay.

MR. MORRIS: But what I'd like to do with the permission of the Court is simply attach those pleadings to the order and deem their pleadings amended to strike the language that — that I've already put into the record in support of the motion.

THE COURT: Okay. That will work for me mechanically.

All right. Well, let's figure out —

MR. RUKAVINA: Your Honor, may I — Your Honor, I have an important question.

THE COURT: Okay, go ahead.

MR. RUKAVINA: So I understand that I will — I understand that will not be allowed to reference that defense today. I'm obviously willing to respect and follow the Court's instruction.

I want to make it clear that the Court is not trying to prevent me from — from arguing anything that has to do with that in front of Judge Starr.

THE COURT: I don't know what — what you mean. Are you — well, what do you mean? I mean there's either going to be a trial in front of him or not. I doubt he's very likely to give another oral argument on this, but is that what you're talking about, in the unlikely event he gives a second oral argument on this?

MR. RUKAVINA: Your Honor, we have not had oral argument in front of Judge Starr. My only concern is that — that if the Court reports and recommends that the MSJ be granted, I believe that I should have the ability before another court to say you should not grant — you should not — you should not go with Judge Jernigan's report and recommendation in part because I was prohibited from raising this defense.

Again, I just want to make sure that — that an order commanding me not to say something applies before this Court but

the Court is not trying to prohibit me from — from, in front of any other court, raising whatever defense might be at the court appropriate.

MR. MORRIS: If I may, Your Honor?

THE COURT: You may. I guess I'm thinking through the most likely scenario, —

MR. MORRIS: Insert, yes, —

THE COURT: — that the most likely scenario, I guess, is if I make a report and recommendation, grant partial summary judgment, and then there's a time period and the local district court rules where a party can object to the report and recommendation, Mr. Rukavina wants to say, 'I object and one of the reasons I object is the Court didn't consider this argument,' and he wants to know he won't somehow be sanctioned or prohibited by my ruling from making that argument.

Am I — am I getting that correctly — correct, Mr. Rukavina?

MR. RUKAVINA: That's exactly — that's exactly — that's exactly correct, Your Honor. Because, again, I'm going to take contempt very seriously.

MR. MORRIS: And, to be clear from my perspective, Your Honor, I fully expect the defendants, whether it's through an appeal of the prior orders or this particular order or through an objection to your report and recommendations, to try to persuade the district court that your decisions on these

matters was incorrect. What I would not expect them to do is to simply put the Pully report and make this argument as part — as part of their merits-based objection. Because there are orders of the Court right now, so I want to be very clear about this, there will be four different orders of the Court. There will be a scheduling order. There will be the orders denying the motion for leave to amend, the motion to put in the Pully report. There will be the order on this. These are orders of the Court. You don't just pretend that they don't exist and just present the same evidence and the same arguments to the district court. What I think you do is you would either appeal these orders or, at a minimum, and I'm not giving advice here and I'm not consenting to anything, but I would think the approach would be to either appeal the relevant orders or to — or to object to the — to the report and recommendation. This is if Your Honor recommends that the motion be granted in any respect and say that, you know, the motion — the Court — the district court shouldn't accept the bankruptcy court's recommendation because they improperly excluded evidence. So if that's all they're trying to do, they shouldn't expect any concern from me, but if they try to introduce the Pully report, you know, for substantive purposes or try to — without having these orders overturned, that's when — that's when they will need a —

MR. RUKAVINA: No, Mr. — Mr. Morris is completely correct, Your Honor. Of course we're not just going to willy

nilly tell the district court, you know, consider these things regardless of what Judge Jernigan ordered. I just want to make sure that by going to the district court and saying, 'Here's an order that I would like you to reconsider or reverse,' that I am not by raising the defense violating this Court's order. And I — just, again, I'm — I've got to protect myself, I've got to respect the Court, I've got to protect my client.

THE COURT: Okay.

MR. RUKAVINA: I just want to make sure that I don't run afoul of that —

THE COURT: I think we're all on the same page here, and that being that certainly you can appeal the order I entered today, you can continue to pursue your motion for reconsideration that's already on file in the district court, and you can argue — in the scenario I grant the motion for partial summary judgment — and let me rephrase that. I don't grant it. There would be a scenario where I might make a report and recommendation to the district court that it grant it. In that scenario, you can follow the district court rules and object to that report and argue among your complaints I should have considered the Pully report — without attaching it — and I should have allowed this defense of Frank Waterhouse did not physically sign. You can make that argument, but, again, that would be in the context of either an appeal of today's order or an objection to a possible report and recommendation of this

Court. Okay?

All right. So it's 11:08 according to my clock. I had allocated 30 minutes for the defendant's motion to strike. Can we — you know, it's 15 minutes each side — can we get through that before we take a break? Is everyone good?

All right.

MR. AIGEN: Yes, Your Honor.

THE COURT: Well, who will take the lead, Mr. Root?

MR. AIGEN: No, I will, Your Honor.

THE COURT: Okay.

MR. AIGEN: Mr. Aigen.

THE COURT: You may proceed —

MR. AIGEN: Are you ready for me to proceed?

THE COURT: Yes, please.

MR. AIGEN: Thank you, Your Honor.

As I said, Michael Aigen from Stinson, representing the defendants. And what I will be doing today is arguing defendants' motion to strike, specifically I'll be arguing that the Court must strike plaintiff's supplemental appendix from the record because it was filed in violation of the rules.

As you know, back in December plaintiff filed its motion for summary judgment. And its summary judgment, plaintiff sought summary judgment on defendants' prepayment defenses, which were asserted by two defendants, NexPoint and HCMS. We then filed our response. In our response, we pointed

out that plaintiff forgot, for whatever reason, to include any evidence or any arguments with respect to HCMS' prepayment defense, as opposed to NexPoint, which was actually briefed by plaintiff.

So then in February of this year, plaintiff filed its reply. Along with its reply, it filed an additional appendix continuing new summary judgment evidence. What this new summary judgment evidence included was a declaration from Mr. Klos, which was two pages of new testimony from him attempting to address, for the first time, HCMS' prepayment defense.

Now nowhere in the reply did plaintiff even attempt to explain why it didn't include this testimony in its original motion or why it should be allowed to introduce new evidence in violation of the rules. I conferred with counsel for plaintiff about this and gave them an opportunity to either withdraw the Klos declaration or explain why this new evidence in the reply was appropriate. In response, rather than withdrawing it or even providing any legal authority, the only answer I got was the reply declaration was a classic reply. I'm not really sure what that means, but respectfully it doesn't really matter at this point.

As you're well aware, the Northern District of Texas, as does throughout the Fifth Circuit, unambiguously prohibits summary judgment movant from introducing new evidence in its reply. This is not a controversial legal proposition and it's

not only not disputed by plaintiff but this general rule is stated in all of the cases that plaintiff put in its brief. And this makes sense. It's designed in order to avoid prejudice, like we'd have here where we'd have no opportunity to contest or address evidence filed on part of a summary judgment. The Racetrack Petroleum (phonetic) case we cited is just like our case, where the district court considered this exact issue, defendant filed a summary judgment reply and submitted new evidence with it, and the plaintiff sought to strike it, and the district court struck it as new evidence.

And, to make matters worse here, plaintiff still hasn't even bothered to file a motion for leave or sought leave in any way here. Instead, their argument is plaintiff suggests that the new Klos declaration is somehow proper because the HCMS prepayment defense was made for the first time in the summary judgment response. This is in their response at paragraph 20.

Two points here. Initially, that simply is not true. As we explained in detail in our reply, we confirmed to counsel that the prepayment defense was part of our justification defense. And, as a result, our corporate rep was questioned at length on this defense by plaintiff. In other words, plaintiff is not going to be able to sit here and seriously argue today that it was not aware that HCMS was asserting its prepayment defense when plaintiff filed its summary judgment, after it specifically deposed our witness on this exact defense.

Plaintiff's only specific complaints about our client's testimony related to defense is that our corporate rep didn't memorize the exact dates on when these specific payments were made, something that easily could have been resolved if plaintiff's attorney showed the witness the relevant documents as was suggested to him, but they didn't bother to do it, so they didn't get the information they wanted. That's their only complaint about the questions they asked regarding this defense.

In other words, this wasn't a new defense that we raised for the first time in our summary judgment response. That's not the case. Plaintiff knew about this defense and took discovery on it, but didn't like our answers. The simple fact is plaintiff either forgot to address HCMS' prepayment defense in its judgment or made some tactical decision to withhold it. They included HCMS in its headings related to the prepayment defense along with NexPoint, but they only address NexPoint. Not sure why, but clearly a mistake was made.

More importantly, none of this really matters. Even if this was a new defense, the law is clear: New evidence is not allowed in the summary judgment reply. We detail in our brief, as we talk about in our reply brief, none of the unpublished cases cited by plaintiff say that new evidence is allowed to be submitted in reply briefs. In fact, those cases recognize the opposite.

For example, we have the Lynch case that was cited by

plaintiff. In that case, the court did allow additional evidence but for a very specific reason. In that case, the new evidence was deposition testimony as obtained — or that was obtained as a result of the other party's request to delay the summary judgment hearing and take this additional discovery. That's obviously not the case here.

And these cases, like they cite, like the Banda (phonetic) case cited by plaintiff, actually say that a summary judgment movant may not file a reply brief appendix without first obtaining leave of court. They could have filed a motion for leave. They chose not to do it for whatever reason.

Additionally, I point out that these few unpublished cases cited by plaintiff, such as the Murray (phonetic) case and the Banda case, only allow new evidence in what the courts call very limited circumstances, where the new evidence was not part of a new argument. And that's important here because that's clearly not the case here.

This is not a situation, Your Honor, where plaintiff is clarifying or even supplementing arguments made in its original motion for summary judgment briefing related to HCMS' prepayment defense. That's not the case here. Plaintiff never made any argument related to HMS and its prepayment defense in its original briefing. This is a completely new argument that they're making for the first time in reply, making the unpublished cases they cited very different than our case. This

is a simple issue for the Court. Defendants' request that the Court strike the appendix containing new evidence from the record because it was found in violation of the rules. To hold otherwise, Your Honor, would be rewarding plaintiff for its failure to follow the rules and either seek leave or file the evidence in the original motion like it was supposed to.

Thank you, Your Honor.

THE COURT: All right. Is this going to be Ms. Winograd's argument?

MR. MORRIS: You're on mute.

MS. WINOGRAD: Good morning, Your Honor. My name is Hayley Winograd, at Pachulski, Stang, Ziehl and Jones, representing Highland Capital Management, L.P. May it please the Court?

THE COURT: Yes, you may proceed.

MS. WINOGRAD: I agree with opposing counsel. This is a very straightforward issue, Your Honor. There is nothing complicated about it.

The second Klos declaration is properly — is properly included with the reply because it serves the sole purpose to rebut argument and evidence raised by HCMS for the first time in its response brief. Fifth Circuit law is clear that when a nonmovant raises evidence or argument for the first time in its response to summary judgment, the movant is entitled to address and rebut that argument in its reply. That's exactly what

happened here.

Highland did not learn of but facts underlying HCMS' prepayment defense until HCMS filed it response to summary judgment. I want to briefly summarize the time line for the Court.

HCMS never actually pled its prepayment defense. On October 29th of 2021, when counsel deposed Mr. Dondero as HCMS' 30(b)(6), Mr. Dondero was unable to identify any substantive allegations underlying HCMS' prepayment defense. And, most importantly, he did not identify the HCMS amortization schedule.

The first time HCMS identified the amortization schedule was in its response to summary judgment. That opened the door to Highland addressing and rebutting the HCMS prepayment defense premised on the amortization schedule. Highland included the second Klos declaration in its reply for the purpose of addressing and rebutting the prepayment defense premised on the amortization schedule. This is not the type of new evidence or new legal theory contemplated under Local Rule 56.7 because it does not constitute new argument. It is rebuttal argument. It is precisely the type of reply evidence permitted under Fifth Circuit law.

I don't want to bog the Court down with case law, but I do want to flag one case particularly on point and that is Lynch v. Union Pacific Railroad. It's a Northern District of Texas case cited in our papers and discussed by Mr. Aigen.

The Court denied the nonmovants' motion to strike evidence attached to the movant's reply in support of summary judgment, noting that evidence was specifically directed at and responsive to arguments and evidence relied on the nonmovant in their response. Noting this is not a situation in which new issues were raised for the first time in a reply, the Court held that to hold otherwise would allow the nonmovant an unfair advantage, using a gotcha procedural approach. Here too the evidence attached to Highland's reply in support of summary judgment is specifically directed at and responsive to evidence and argument — arguments raised for the first time in HCMS' response to summary judgment.

In suggesting that there is somehow a blanket prohibition on attaching evidence to a reply in any and all circumstances in summary judgment, defendants ignore the law. But defendants must agree with the law on some level, because they attach an appendix to their reply in support of their motion to strike Highland's reply appendix. And they did so for the simple and proper purpose of rebutting an argument Highland made in its response to defendants' motion to strike. And it's not a reply in support of summary judgment, but it's the same concept.

The notion that Highland somehow forgot to address the HCMS prepayment defense in its motion for summary judgment is belied by the record. Two defendants assert the prepayment

defense, NexPoint and HCMS. Highland was able to adequately address NexPoint's prepayment defense in its motion for summary judgment because Highland was aware that in support of that defense, NexPoint was specifically relying on the NexPoint amortization schedule.

The NexPoint amortization schedule was referenced extensively throughout counsel's depositions of Klos, Seery, and Hendrix. The same is not true with HCMS. HCMS never identified the amortization schedule until it filed its response to summary judgment.

Defendant also implies and argues in its papers that counsel's vague reference to digging out the spreadsheet during a seven-hour deposition was somehow enough to put Highland on notice that HCMS was relying on its amortization schedule and that we took discovery and that we were actually in possession of this document. We were in possession of a lot of documents, but it was our job to conduct a fishing expedition in order to figure out what specific document counsel may have been referring to during his deposition. If Highland was aware that HCMS was specifically relying on the HCMS amortization schedule in connection with its prepayment defense, it would have addressed this defense in its motion for summary judgment but the same way it able to do with NexPoint.

Highland's inclusion of the Klos declaration in its reply to summary judgment serves the singular purpose of

addressing and rebutting argument and evidence raised for the first time in HCMS' response to summary judgment in connection with it prepayment defense. And, in doing so, it serves to close the door on this issue and aid the Court in determining whether, based on all of the evidence before it, there is a genuine issue with material fact regarding the merit of the HCMS prepayment defense.

Again, this is not the type of new evidence contemplated under Local Rule 56.7 because it constitutes rebuttal argument. It serves to rebut argument raised by HCMS in its response to summary judgment. For these reasons, defendants' motion to strike the reply appendix should be denied. Thank you.

THE COURT: All right. Mr. Aigen, your rebuttal.

MR. AIGEN: Yes, Your Honor. Accepting plaintiff's counsel's argument would mean that any party could sit on their hands, stick their head in the sand, not ask questions about a particular defense, and then have the privilege of putting in all their defenses in a reply and just skip putting it in the motion. They keep saying this was addressed in the first time for summary judgment, but then also concede and admit and agree with me that they questioned our corporate rep on this exact defense. It clearly was not a defense we asserted for the first time in summary judgment, when they questioned our witness on it.

They talk about this amortization schedule and tell you we should have identified it, but yet we don't hear a response to when our witness said, 'I don't have the dates memorized,' and our counsel said, 'Why don't you use a document to refresh them,' we don't hear a response as to why counsel didn't say, 'Hey, that's a good idea. Where is that document, what is that document?' They just said, 'Nope, I'm fine, stuck their head in the sand and preceded to play a game of Gotcha. That's not how this works.

They knew about this defense. They took discovery on it. They filed a summary judgment. And, respectfully, is — there was a date. The heading says HCMS and NexPoint. The section and the briefing under it don't even mention HCMS. If they were relying on the fact that they knew nothing about this defense which was asserted, they would have wrote that in their brief. If they didn't know HCMS was asserting a prepayment defense, they wouldn't have included them in the caption.

They made a mistake. They want to run from it. That's not proper here. They have to follow the same rules we do. They could have filed a motion for relief. They didn't bother. Maybe they just didn't want to delay any of these proceedings, I don't know. They talk about this being classic evidence. The only case that they've mentioned now is the Lynch case. And I will reemphasize what I talked before, in Lynch the only case they have brought to you now in this argument that

they think supports them, the additional discovery, the additional evidence was submitted were depositions taken after the summary judgment was filed. So of course the Court let that in. The other party requested that discovery and, according, said these are very limited circumstances and you need to go file a motion for relief.

I will repeat, Your Honor. If this is allowed, any party could stick their head in the sand, not ask questions, and all of a sudden they didn't know the answers, so they could wait till the summary judgment reply, put in evidence, and not be able to get I it rebutted.

And I think it's important — the Klos declaration, what it talks about in paragraphs 3 and 4. It talks about the payment was made applied at Mr. Dondero's direction to ensure that the note had no interest outstanding.

And, in paragraph 4, it talks about that Mr. Dondero's direction to make the payments conclusively establishes that HCMS knew that all interest due as of December 31st was required to be paid, notwithstanding a prior prepayment.

What this means is that Mr. Klos is testifying to directions allegedly made by Mr. Dondero regarding the payment. The reasons that Mr. Klos believes that such payments were made and what he thinks HCMS knew and didn't know, without providing — so, basically, he's testifying on the state and mind of intent of a client, stuff he's never testified to before, without

giving us the chance to rebut it. And their reason for thinking they get to do this is they didn't bother asking questions on a defense we asserted, even after it was suggested to them, 'Hey, let's use documents,' and now they have the nerve to come up here and say, oh, well, we — you know, although they produced the document to us, we have too many documents. How were we supposed to know what document they were going to use even though counsel in the middle of the deposition said, hey, maybe we should use documents to get the answers to this. And they said, no, we don't feel like it.

That's not allowed, Your Honor. They're here today saying we need to abide by the black letter of every rule. They need to do the same thing. Thank you, Your Honor.

THE COURT: A couple of questions. Do you disagree that this defense was never pleaded?

MR. AIGEN: We pled it as part of justification. And we made it clear prior to the deposition, just in case, we told counsel, and in correspondence this is recorded, that our prepayment defense was part of justification. And they then proceeded to take our deposition on that defense. They had no issues with that. And if, for some reason, they're taking the position today that this is all based on something we needed to plead and didn't, then that's a proper basis for summary judgment. It's not a proper basis for violating a completely different rule about what you could stick in a reply brief. So

we did plead it, we called it justification —

THE COURT: So elaborate. So elaborate. I don't have it in front of me, but I don't know if I need it right in front of me, what was the exact wording of your justification defense?

MR. AIGEN: In the actual answer, which I don't have in front of me, we called it justification, and there wasn't details on it. And then to make it clear before the corporate rep deposition, because he was testifying on our defenses, we sent a letter saying that similar — and this is in the record, I don't have it right in front of me, but it's part of this where we said to them, hey, this includes the prepayment defense, just like NexPoint.

THE COURT: Okay.

MR. AIGEN: And, again, Your Honor, —

THE COURT: Go ahead.

MR. AIGEN: Sorry. I was going to say even if what they're trying to argue is we can't bring a defense today because it wasn't pled properly in our answer — which I disagree with — but even if they're saying that, the proper recourse was then to move for summary judgment on that defense, which they knew of, and try to strike it, not to violate the other different rules of their choosing by putting additional evidence in a reply brief. You don't get to pick and choose which rules you want to violate because you think someone else violated a different rule. You have to go to court to seek leave to get

the relief you want.

THE COURT: Okay. What about if you could squarely address the argument that it's — it's rebuttal evidence, it's not new evidence because the amortization scheduled was included in the response?

MR. AIGEN: It's not — that's a good question, Your Honor. The amortization schedule is our evidence. What their evidence is, is Mr. Klos coming in and interpreting it and telling you why Mr. Dondero made certain payments, without any discussion of how he knows that. So the amortization schedule is in the record. We put it in. They — we produced it to them. They have it, they had it all along. The new evidence that we're objecting to is Mr. Klos coming in and providing his subjective interpretation as to what HMS knew and thought and believed when it made payments in accordance with that schedule. That's the reason they want to get the Klos declaration in, not to prove payments were made or not made in the amortization schedule.

THE COURT: You don't think that's rebuttal evidence? You don't think that's rebuttal evidence, rebutting the —

MR. AIGEN: Everything in a reply — yeah, everything in a reply is being used to rebut things we stick in a response. That doesn't change the law that you can't stick new evidence in to do that. The rules and the law and the cases say you can make rebuttal arguments, you can't stick rebuttal evidence in.

You have to seek motions for leave. In the very limited situations where courts did allow additional evidence, like we said, all the cases they cite say no new evidence in reply, but let me look at these very exceptional circumstances here.

So rebuttal arguments, yes. Rebuttal evidence, no. And the exceptional circumstances, as I said, the case they rely on is the Lynch case where the discovery and the new evidence they were fighting over was taken after the summary judgment at the request of my side, so of course it made sense for it to come in. So, yes, they're using it to rebut, but they're using it as rebuttal evidence, which is improper, not rebuttal argument, which would be proper.

THE COURT: Okay. All right. I think now is a good time for a break. I'm going to go deliberate on this a few minutes. The question is do we want it to be a short 15-minute break or maybe a 30-minute lunch break. Any — because we're going to have a long, I think, four hours to go here.

MR. MORRIS: To the extent my voice carries any weight at all, Your Honor, my preference would be to take the longer break and then just sit for the summary judgment argument.

THE COURT: Okay. Votes?

MS. DEITSCH-PEREZ: If I could weigh in, just for the purposes of making sure we're all able to pay attention when we're arguing, I would just ask that if Mr. Morris is going to go on for two hours, that we at least have a break before, you

know, a restroom break before we start up again.

THE COURT: Okay, that makes sense.

MR. MORRIS: No problem with that. Yeah.

THE COURT: Any — any other views?

All right. Well, let's go ahead and take a 30-minute break. We'll come back and I'll give a ruling on this motion to strike and then we'll hear Mr. Morris' motion for summary judgment. And then we'll take another break, you know, a 15-minute or so break. And then I'll hear the defendants' responses. All right, we'll see you at 12:02.

COURT SECURITY OFFICER: All rise.

MR. RUKAVINA: Thank you, Your Honor.

MS. DEITSCH-PEREZ: Thank you, Your Honor.

(Luncheon recess taken from 11:33 a.m. to 12:21 p.m.)

COURT SECURITY OFFICER: All rise.

THE COURT: All right. Please be seated.

I apologize for the wait. Spent a little more time drilling down on the pending motion to strike than I thought I would need to.

We have everyone here it looks like that we need.

I have one last question before I give a ruling on the motion to strike the supplemental David Klos declaration. Is there a stipulation that is somehow relevant to this analysis? I saw in the papers a dangling reference to 'We have the stipulation.' I think it was — I can't remember if it was an

attachment, an email attachment to the motion to strike. I think that's where it was, where there was —

MS. WINOGRAD: Yes, Your Honor.

THE COURT: Go ahead.

MS. WINOGRAD: I can answer that.

THE COURT: Okay.

MS. WINOGRAD: Highland and NexPoint stipulated that NexPoint has a prepayment defense, and you can different that at Adversary Proceeding 21-3005, at Docket Number 146. And this was filed on January 2nd of 2022. I don't think there has been a stipulation, though, that HCMS had the prepayment defense.

THE COURT: Okay. I'm slow to pull that up. Okay. Which — which adversary?

MS. WINOGRAD: So that's 21-3005 and that's the NexPoint proceeding.

THE COURT: Okay. And, again, what docket entry number? 146? 146, January 2nd.

MS. WINOGRAD: And this also describes that NexPoint was using as its supporting documentation the amortization schedule.

THE COURT: Um-hum. Okay. And, again, the — your argument is this is significant because there was no similar document in connection with the HCMS and that —

MS. WINOGRAD: Exactly. So —

THE COURT: Go ahead.

MR. AIGEN: Well, no, Your Honor, that argument was never made in the papers. And I if they did, we would have shown that it was produced to them, as they admitted they had them. They had the document. They're not saying they never got the document —

THE COURT: Well, no, they admit they had the document. I've read in the pleading, it was footnote 8 of their response to this motion to strike that they had it, they produced it on June 9th, before HCMS ever answered. So I guess what I'm getting at — and, again, I asked her, so she's answering. You know, this is like —

MS. WINOGRAD: But —

THE COURT: — I wondered back in chambers, as I was reading the pleadings and thinking through this, was there a stipulation that might shed light on this in some sort for me because it — it was referenced in your motion to strike, I think, where you reached out and asked them to withdraw this. And, as I recall, Mr. Morris said no. And we have the stipulation. And so I was left dangling which stipulation did that mean.

MR. AIGEN: Your Honor, I may be mistaken, but I think that stipulation was part of an email. And the reason it was part of the record was the other part of that email was Ms. Deitsch-Perez and making sure the other side was aware that prepayment was part of her justification defense. And that's

why that email was in there. I think that also happened to be connected to the email you're talking about with a stipulation. So it certainly — as I — our answer was it wouldn't be relevant but that, I think, is why it was in the record, because it was part of the full email chain with the other part of it.

MS. WINOGRAD: And, Your Honor, if I may be heard, because I believe you asked me a question before counsel interrupted me, —

THE COURT: Go ahead.

MS. WINOGRAD: — trying to get some clarity on our argument. And I would like to note that you nailed the precise argument. The argument is while we were on notice as of the end of October of 2021 that HCMS was also asserting a prepayment defense, we were not on notice of the supporting documentation underlying that defense as it pertains to HCMS, the way we were with NexPoint. We knew NexPoint was using the amortization schedule. That is — that is the specific document that is central to our argument. We did not know that HCMS was using this specific document. That is why we had our reply include the Klos declaration as a rebuttal argument to the HCMS prepayment defense that we learned was premised also on an amortization schedule that was raised — and that was raised for the first time in their response brief that HCMS had never previously introduced or identified the amortization schedule the way that NexPoint did. And that is why we were able to

address NexPoint's prepayment argument in our initial motion and we weren't with HCMS.

MR. AIGEN: And, Your Honor, as we put in our motion, Ms. Deitsch-Perez during the deposition, when they tried to make it a memory test, said, 'Hey, why don't you use the schedules that show the payments,' and the answer from counsel was, 'No, thank you. I'll do it my way.'

So I don't know what else they needed other than us introducing exhibits and putting on our own case during our own corporate rep deposition. They took the deposition, they asked the questions. They didn't say what documents, or anything. But counsel still said, our counsel, our side, said, 'Hey, why don't you use the documents,' and their answer was literally, 'No, thank you.'

MS. WINOGRAD: But —

MR. AIGEN: Not, 'I'll get back to it later'; 'Hey, tell me what documents'; 'They didn't serve discovery; what are you relying on?' We offered it to them, and they said no thank you. They're sticking their head in their sand, and they don't get rewarded for that, Your Honor.

MS. WINOGRAD: It's — the burden is on the defendants to prove each element of their affirmative defense. When we asked from the belt their prepayment defense, they could not provide us with any allegations in support of that defense, including in pertinent part the amortization schedule they are

now relying on. It is not our burden to tell them what documents they are relying on.

THE COURT: Okay.

MR. AIGEN: Your Honor, I don't know what can't — what didn't provide. Counsel said, 'Hey, use the documents.' and they said, 'No, thank you.'

THE COURT: All right.

MR. AIGEN: Well, you can use the documents that shows payments. They wanted to make a memory test.

THE COURT: I've heard enough.

Well, thank you all for your arguments. I know a lot of ink was spilled on this issue and, like I said earlier this morning, this is not a terribly easy contested matter. But I am going to grant the motion to strike. I guess what matters to me more than anything else is that the amortization schedule for HCMS was not a surprise to the plaintiff, in fact they are the ones who apparently initially produced it, again according to this footnote, on June 9th, 2021. So I am going to stick to the normal rule that we don't attach evidence to a reply absent a motion for leave and the Court having a contested hearing on that.

So I will ask Mr. Aigen to upload an order on that motion.

All right. Well, at long last, it's 12:30. We'll now turn to the motion of Highland for partial summary judgment on

each of these different notes.

Mr. Morris, you may proceed.

MR. MORRIS: Thank you, Your Honor. John Morris, Pachulski, Stang, Ziehl and Jones, for Highland Capital Management, L.P.

I want to begin, Your Honor, by thanking you and your staff for the work that's been done on this. This should have been a simple collection — collection action on some unambiguous promissory notes, but the record is obviously quite voluminous. And I've spend the last, you know, year plus kind of playing whack the mole and trying to figure out where the defense is going to shift. Every time I find evidence to rebut an assertion or a contention, a new one arises, a new defense arises, a new twist on the defense arises.

And it's been — it's been challenging, but I don't think that all of the maneuvers mount to a hill of beans, frankly. I think that the presentation that we made in our motion and in our reply, Your Honor, I'm certain that you've — you've spent some time with that. I'm a hundred percent confident that my team and I have fairly cited to the evidentiary record. There is actually very little argument, I think, that we make in our papers. It is more a presentation of what we believe are the undisputed facts.

And, again, I appreciate you — this has been —

(Tones.)

MR. MORRIS: — a lot of work for everybody, and let's just — let's just get on with this now.

And so I'd ask Ms. Canty if she could put up the slide deck that I circulated to the Court and to counsel prior to the beginning of this matter. And if we could just go to the next slide.

I want to begin, Your Honor, where I think I ought to, and that is the law. And I don't presume to tell the Court what the law is. The law on summary judgment, I'm sure, is well known to the Court, but with those kind of cautionary remarks, I would just like to go through the legal standards which, consistent with my practice, I try to footnote everything so the Court can see exactly where it's coming from, so you can see the paragraphs of our brief that the following comes from. And I don't think there's any dispute about the standards, so let me just go through it quickly.

Obviously under Rule 56(d), the standard is that there be no genuine dispute of a material fact, right. And so what does "genuine" mean? A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. That's — that's the standard, right. It's not is there a — you know, it's not a criminal case, I don't have to prove beyond reasonable doubt. I don't have to prove, you know, any standard other than this one.

I don't have to prove that there's no disputes of

fact. Obviously, you know, if I said today is Wednesday, the defendants would probably say, no, it's not, it's the day after Tuesday, or it's the day before Thursday. This is — you know, this is the nature of this particular case. But let's be clear. A dispute about a material fact is genuine only if the evidence is such that a reasonable could return a verdict in favor of the nonmoving party.

I think it can meet its burden in one of two weeks. It can demonstrate an absence of evidence, supporting the nonmoving party's claims or, in this case, defenses; or it can succeed by proving the absence of a genuine issue of disputed material fact.

The defendants have to show here, more than some metaphysical doubt as to the material facts. They can't satisfy their burden by relying on conclusory allegations or unsubstantiated assertions are only a scintilla of evidence. The Fifth Circuit has held where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant or where it is so overwhelming that it mandates judgment in favor of the movant, summary judgment is appropriate.

And if we go to the next slide, here is the thing, Your Honor, in all that paper you have, the part that consumes the least amount is our claims, our claims for breach of the demand notes and breach of the term notes. And why is that?

Because there is no way to contest it with the exception of HCMFA. And I know Mr. Rukavina has passionately attempted to argue that they're not liable under the notes, but in the evidence that we cited to in our motion, in Mr. Dondero's declaration he really admits — although I don't know what Soft Note is, that's just my own lack of knowledge I guess — I don't think that it matters that it was unsecured, right, I don't think any of that matters, but the essential elements are met. There are, with the exception of HCMFA, everybody agrees that they signed the notes, everybody agrees that they received the money, everybody agrees that the notes were given in exchange, and everybody agrees that they didn't pay in December 2020. And so what we put on the screen, which we take from the first Klos declaration, as to which there was no objection, the damages that arose, you know, unpaid principal and interest as of the date of the motion. And obviously this will have to be updated if this Court either recommends and the district court grants or, you know, whenever we get a judgment, if we ever get a judgment this will have to be updated, but we present on this slide the damages as of the motion date for the demand notes.

And if we can go to the next slide, we've got the damages under the term notes. And then we're entitled to cost of collection. Whether it's a demand note or whether it's a term note, they both unambiguously provide that if we have to go to bankruptcy court or otherwise seek to collect, you know,

engage counsel, we're entitled to our costs of collection. We've put in a lot of evidence about those costs, but we can't — you know, we're like a dog chasing our tail here, those costs continue to increase at this moment.

And so we specifically noted in our motion at footnotes 31 and 32, I believe, that we reserve the right, that we wanted an opportunity to come in and litigate, you know, the issue of costs. And, in fact, that's exactly what Rule 54(d)(2) provides.

So if a judgment is entered, we'll have that opportunity. And the only thing that we ask the Court to find here, if the Court finds that we're entitled to any portion of the motion for summary judgment or, you know, if you're going to make that recommendation, that you also make the recommendation that Highland is entitled to its costs and fees pursuant to the plain and unambiguous terms of the notes.

If we can go to the next page. This is just a summary of the various defenses. Just to try to make it easy so the Court has a score card, there is, you know, four or five principal defenses, different defendants assert different defenses, so we have just kind of laid it out here so the Court has an understanding, right. And the reason that HCMFA doesn't claim the oral argument subsequent — condition subsequent defend is because they claim that the note should never have been signed, it was a mistake and without authority. So they can't —

I guess they could have pleaded in the alternative, but they didn't. And so you've got — you know you've got some differences, right? The failure to perform under the shared services agreement. That would be inconsistent with HCMFA's defense, and I don't even think Mr. Dondero contends that he had a shared services agreement. And no defendant except for NexPoint or HCMS contends that they prepaid.

So that's kind of a summary of the allegations. And I want to start with the first one, the oral agreement, the condition subsequent. If we can go to the next slide. I'm sure Your Honor has heard the saying, you know, people don't like to see how the sausage is made and there's a reason for that. And the reason is it's usually pretty ugly. But what we set out very clearly in our moving papers, which I think was completely ignored by the defendants is how the allegations concerning this alleged agreement that Mr. Dondero or agreements that Mr. Dondero entered into with his sister materially changed over time.

And I think that that's critical, because if you go back to the legal standard, Your Honor, of course you know one of the things you'll have to consider in issuing your report and recommendations is whether a reasonable jury is going to buy this defense. Are there enough disputed facts that would enable a jury to say, yeah, this defense makes sense to me. This is totally credible.

I'm not asking you to make credibility findings on witnesses, right. You haven't seen any witnesses to do that. You're just reading paper, but — but these are the undisputed facts. There are — everything I'm about to say is undisputed.

These actions were commenced in January of 2021. And in Mr. Dondero's initial answer on March 3rd, again citations to the footnote here, Mr. Dondero asserted that Highland was not entitled to recover on the notes and that their claims should be, quote, barred, because it was previously agreed that plaintiff would not collect on the notes. So that was his position: You can't collect because there is an agreement that you wouldn't collect. Okay.

What's really — what's really notable here, and I'll talk about this more in a moment, is that none of the other three corporate defendants, NexPoint, HCMS, HCRA, who now assert the exact same defense, none of them put that in their initial answer. And why is that significant, Your Honor? Because Mr. Dondero is the source of this affirmative defense that he put into his defense. Why wasn't it put into any of the corporate defendants' defenses initially? And obviously that's a question that I would ask Mr. Dondero if we were actually in front of a jury: How do you explain the fact that you forgot to assert this defense on behalf of all of these corporate defendants?

So we proceed. We served some discovery. We asked Mr. Dondero in light of this defense admit that you didn't pay

any taxes on the money that the plaintiff agreed not to collect. And realizing that he didn't pay taxes, right, this is undisputed facts, he answered — he amended his answer at the last second, I think he was within the time period where he could still unilaterally amend his answer, to add the magic words: Upon fulfillment of conditions subsequent. So now instead of an agreement in the past that was already in place for forgiveness, now it was going to be dependent on some future event.

Ten days later, because this is an adversary proceeding and you have to comply with Rule 26, Mr. Dondero makes his initial disclosures under Rule 26. And this is not some, you know, happenstance kind of presentation. Mr. Dondero took the time to identify 15, quote, individuals likely to have discoverable information. But his sister wasn't on it. So if we ever get to a jury, he's going to have to explain to a jury why he forgot in his long list of more than a dozen individuals, which I think includes me, by the way, he thought to include me, but he didn't include his sister, the person with whom he entered these agreements. And, remember, Your Honor, we got this in our — I think it's in our reply. If you look at Mr. Johnson, Mr. Dondero's expert, his analysis of Mr. Dondero's compensation, he was only paid $500,000 a year for the three years during which all of these notes were entered, for a total of about a million five or a million seven, and we're talking

about the forgiveness of $70 million of notes, right. Can you imagine sitting in front of a jury and saying what would you do — and we're going to talk about this in a moment — if you made $50,000 a year and somebody said there's a way to get two million. Well, that's the position that Mr. Dondero found himself in. And yet on April 15th, he forgot his sister. He's going to have to explain that to the jury.

But it gets better, because — or better for us, anyway. This is the sausage being made, Your Honor. This is what I meant about whacking the mole. So now on December — on April 26th, he answers some additional discovery requests. And we ask him specifically: Who entered the agreement on behalf of the debtor. Who entered the agreement on behalf of Highland.

Again, you can look at Exhibit 82, page 4, Answer to Interrogatory Number 1, these are just undisputed facts that Mr. Dondero said, quote: The agreements were entered into on behalf of the debtor by James Dondero, subsequent to the time each note was executed. He did. That's his story. This is in response to interrogatories. I believe they're sworn. But whether they are or they aren't, the fact remains that as of April 26th, he took responsibility and said he entered the inter- — into the agreements by himself.

He was also asked now more specifically, not just to disclose who had information, who he thought had information about the case, we served him an interrogatory that says: Tell

us everybody who knows about the alleged agreements. Tell us everybody. And, again, he identifies five people, none of whom have any relevant evidence, by the way. Right, they're not — they weren't deposed, they're not — there's nothing in the record about the people who he actually identified. But, again, kind of a glaring omission. Who has actual knowledge of the alleged agreement, not Nancy. Not in this interrogatory response. Sausages being made.

They make a motion to compel, Your Honor. I don't know if you recall, but they made a motion to compel to require Jim Seery to testify, I think, about the history of the forgiveness of loans. And we opposed the motion. And we had an oral argument. And, if my colleague Ms. Canty can put up on the screen the transcript of the hearing, just a portion of it, so this is the hearing. The hearing occurs on May 20th. And if we can go to page 23, towards the bottom, you're going — my response to this, Your Honor.

So I say, quote, let's look at what the defenses are, and why we feel like it's a burden to even entertain these concepts, his first answer, Your Honor, said that the notes were forgiven based on an agreement. So we asked him in an interrogatory or a request to admit, I forget which, shows us your tax returns, that you paid the taxes. Of course he didn't pay the taxes because of course the note wasn't forgiven. So instead he amends his answers, he amends the affirmative defense

to add the words: Pursuant to a condition subsequent.

Okay, he didn't say that the first time. The first time it was: It was forgiven. And now it's not forgiven. But it's basically deferred until a condition subsequent. So he's not even contending, if you look at his amended answer, he's not even contending that it was forgiven. He's simply saying that the obligation to repay has been deferred pursuant to an oral agreement, under which he does not have to pay, until the debtor completes the liquidation of his assets. Basically, if you read it, that's what it says, and that's how we got here.

Keep scrolling, please.

I continue. I don't know if you picked up on it, Your Honor, but in response to an interrogatory, when we said, "Who made the agreement on behalf of the debtor," Mr. Dondero said that he did. Okay, this isn't an oral agreement unless he was talking to himself. This is something that happened, according to him, in his head, that somehow he, as the maker of the note, had a discussion with himself in his capacity as the chief executive officer of the debtor, and the two of them, in his head, agreed that he wouldn't have to pay. Initially wouldn't have to pay at all and now apparently doesn't have to pay until the debtor completes its sale of assets. This is what the defense is here.

Please continue.

So let's be very, very clear about it. It's not an

oral agreement, it's something that he's making up in his head that he didn't make up the first time, that he changed the second time, and that he, that he can't describe at all. One of the interrogatories said, "When did this take place," he didn't answer that part of the interrogatory. He wasn't — he hasn't told us.

So you could take this down.

This is where we are on May 20th. We've had one big — we've had one substantive changed of the defense from 'They told me I wouldn't have to pay' to 'They told me I wouldn't have to pay based on condition subsequent.' We've had Rule 26 disclosures, no Nancy. We've had interrogatory response, 'Tell us who has knowledge of the alleged agreement,' no Nancy. We have an interrogatory response where Mr. Dondero says that he made the agreement. And so we have this hearing on the 20th and it's got to be a little humiliating, right. Everybody's got to know this isn't going well. And so what happens? He goes back to the office, he meets with his lawyers, and the next week they amended Rule 26 responses, they amend their discovery responses to add Nancy Dondero, and Mr. Dondero testifies on May 28th. This is all record, it's part of Mr. Dondero's transcript.

This is how the sausage is made, Your Honor. You thought that this defense was probably like, yeah, this has been the defense. It hasn't been the defense, it has changed. How is Mr. Dondero and Nancy Dondero going to stand up in front of a

jury and explain this? Because here is one last fact. Some time after May 28th, after all of this happened, after they come up with the Nancy Dondero story, right, his sister, that's when NexPoint, HCMS, and HCRE adopt the same defense. And that, in conjunction with the withdrawal of the reference, I don't have to remind Your Honor this is what's happening in June of 2021, where we finally just say, fine, withdraw the reference subject to the report and recommendation until — until the cases are trial ready, let's consolidate for discovery purposes, and we proceed from there because now four of the five defendants are adopting the same defense. That's how the sausage is made, Your Honor. It's not pretty. But as you consider how to fashion your report and recommendation, the debtor urges you to take into account the changing nature of the story and the fact that Mr. Dondero three times forgot his sister and said, 'I entered the agreement on behalf of the debtor.' And it's only after that humiliating presentation on May 20th that they come up with the new Nancy Dondero defense. That's when it happens, that's the time line.

Let's go to the next slide, please.

Mr. Dondero is also going to have to explain on behalf of himself and NexPoint and HCRE and HCMS why he always acted against his own self-interest. Because, as I said, according to Mr. Dondero's expert, he only earned $1.7 million over the three years during which $70 million of notes became subject to these

agreements, approximately 40 times his compensation. He's going to have to explain to the jury the following seven, he's going to have to provide an explanation for the following seven undisputed facts. Right, they don't address any of these, but he's going to have to explain every single one. And we ask the Court to consider what's a jury likely to think when they get questions about this.

Mr. Dondero and Mrs. Dondero are going to have to explain why they didn't tell anybody about the alleged agreements. And for this purpose, for this very limited purpose I'll just limit it at the time they were executed, at the time they allegedly were entered into. There's no facts, there will never be any facts. It's contradicted by their discovery responses if they try to claim now that they told no one about any of these alleged agreements at the time they were entered. Nancy Dondero was clear that she never told anybody in the history of the world prior to the commencement of this lawsuit about this. And Mr. Dondero says only, claims only that he told Frank Waterhouse, but the evidence speaks for itself. He never told Frank Waterhouse, he never used the word agreement, he never used the word Nancy, he never used the word Dugaboy, he never used condition subsequent, he never talked about forgiveness. He just said, hey, that's part of my compensation. And he said it in the context of settlement discussions, right, negotiations. We've heard that word recently.

How come you didn't tell anybody, Mr. Dondero? Wouldn't it have been in your interest to do that. How come you didn't tell PWC? Wouldn't it have been in your interests to tell your auditors, 'Hey, I've got these agreements. You may not want to — you may not want to value the note at a hundred percent because there's a really good chance they might be forgiven.' But he never told PWC, even though disclosure was unambiguously required, facts not in dispute, and I'll talk about that more for just a moment shortly. No dispute that there's no writing that exists that memorialized the terms of the alleged agreements. How does somebody enter into an agreement for the forgiveness of 40 times your compensation and not send a confirmatory email, not have your board adopt resolutions approving it, not summarize your terms somewhere so that you have a definitive writing so that nobody forgets because there's dozens of promissory notes that are allegedly subject to these myriad agreements? Didn't put anything in writing.

How is he going to explain to the jury that under his watch Highland time and time and time again filed monthly operating reports and schedules of assets that included all of these notes at a hundred percent, right, disclosures made to this Court, no dispute that Frank Waterhouse prepared him, his signature is on them, sometimes electronic, by the way, you know, there's a heresy against electronic signature, but if you

look at his signature, it's plainly electronic most if not all the time. Even in October and November and December, when Jim Dondero was fully in control of the enterprise, all of these notes are disclosed as assets of the estate. How is he going to explain that to the jury?

And the interesting thing, Your Honor, is if you look — I don't remember the exhibit number and I hate to burden the Court, but if you look at some of the monthly operating reports where they discuss — I think it's the operating reports and not the schedules — at the value of the notes, there is actually a footnote that puts the world on notice that the Hunter Mountain note is likely not collectable. So all of Highland's creditors at least one notice that Hunter Mountain may not be collectable, but there's no disclosure of any kind about these alleged agreements even though it would have been in Mr. Dondero's self-interest to put it in there.

We made demands — it's in the record — we made demands for a full payment under the demand notes on December 3rd, 2020. Wouldn't it have been in Mr. Dondero's self-interest to say, 'Wait, wait, wait, what are you talking about, I had these agreements with my sister. Let me tell you about them.' Right? It would have been in his interest to do that at that time, but he didn't. He didn't say anything.

We had a confirmation hearing. And Mr. Dondero and the advisors and Dugaboy, and I can't remember how many entities

filed their objections to confirmation. And they come up with every single argument, absolute priority rule, 2015.3. I mean they come up with every single argument. I've skipped number 6. I'll come back to that in a second — actually, no, it is number 6. They come up with every single argument. And you know the one argument that they don't come up with, kind of weird, those notes that your projections show are assumed to be collected in 2021, there's no objection that that projection is unreasonable. There's no objection that that projection is unreliable. There's no statement that Highland has it all wrong. It's assumption letter C to the projections to the — that were attached as part of, I think, the disclosure statement. And then they were amended on the eve of trial, because by that time we had already commenced the lawsuits. So they were amended on the eve of trial to add the term notes.

We get to confirmation hearing. Mr. Dondero's lawyer very diligently cross-examines Mr. Seery. There's questions about the notes. There is oral argument about the notes. Wouldn't that have been a good time to say, 'Hey, wait a minute, I've got this agreement with my sister.'

None of this ever happened. And I think this is just such devastating facts, Your Honor, on slide 6 because they ignore it all because they can't dispute any of it, they just can't. And you're going to have to put yourself in the position of a juror, you're going to ask a jury, are you going to

recommend to Judge Starr that he seek a jury so that they can have me cross-examine Mr. Dondero and Ms. Dondero about why they failed to act in their own self-interest on all these occasions. I think that would be a waste of time to pursue.

Can we go to the next slide, please?

So I mentioned that Mr. Dondero had the obligation to disclose this alleged agreement or the alleged agreements with his sister. He's a CPA. You know if he was a compliant executive or if he was part of a compliant organization, he would have stood by the representations that he made to PWC in connection with the audit for the period ending December 18th, 2018, but he did not. He made no disclosure of these agreements with his sister. And what his singular defense to his failure to disclose is: They weren't material.

Mr. Dondero should no better. If he was really compliant, he would know that he doesn't decide what's material, the auditors decide what's material. And the audit letter that he signed, that's Exhibit 33, specifically said materiality is $1.7 million.

In our moving papers, Your Honor, we cited to probably five or six different representations that Mr. Dondero and Mr. Waterhouse made to PWC. I'm only going to focus on two here, but I'm not — I don't want to take the time to repeat everything that's in our brief. I'm just highlighting a few things here.

Number 11, representation. Number 11 that Mr. Dondero

made, receivables recorded in the consolidated financial statements represent bonafide claims against the debtors for transactions, right, so that's one.

But 36 is just the killer: We have disclosed to you the identity of the partnerships, related parties, and all the related party relationships, and transactions of which are aware. And the interesting thing about this is, Your Honor, related party transactions are so critical to an auditor's work that it's not even subject to the materiality level.

If you take a look at Exhibit 33, on the first page where it discusses materiality, it makes it clear that materiality only applies to those representations where the phrase is used. The phrase materiality is not even used for related party transactions. If Mr. Dondero and his sister entered into agreement for $25, according to Representation Number 36 that would have to be disclosed. There is no disclosure. Mr. Dondero was a CPA. Mr. Waterhouse is a CPA. They made these representations to the auditors. And if these agreements actually exist, then their financial statements, their audited financial statements are materially misleading. It's one or the other. I think it's the former myself, but that's for you to decide as the judge.

You know we made an argument in our papers, in our moving papers and we made the argument again in reply that there is no basis under the partnership agreement for Dugaboy to act

in the way that Mr. Dondero contends that he did. And I don't want to spend a lot of time on it, Your Honor. You have the partnership agreement. It's Section 3. It is a 100-percent legal issue, but we do not believe that Dugaboy even had the authority to do what they now contend it did. And we hope that — I didn't prepare a slide on that — but we hope that Your Honor will look at that if the Court deems it necessary, because that's an issue that we raised and that we're raising again.

Let's go to the next slide.

So even if you think that perhaps jury should hear this story, should hear how the sausage was made, should hear Mr. Dondero explain why seven different occasions he failed to act in his own self-interest, the undisputed evidence shows that the alleged agreements would nevertheless be unenforceable due to a complete lack of consideration. Your Honor, if you've read the papers you know that there's two ways under the alleged agreement that the condition could be met. One is if certain portfolio companies were sold for greater than cost. So if Mr. Dondero was in control and certain portfolio companies were sold for greater than cost, $70 million of notes would magically be forgiven.

This contingency doesn't apply because Mr. Dondero hasn't sold any of the portfolio companies. And we did note in our motion papers that he sold a substantial portion of MGM, one of the three so-called portfolio companies, back in November

2019, not to suggest that he would have been entitled to forgiveness as a result but to point out, and I could have added it to the prior slide, that would be opportunity number 8, when Mr. Dondero was specifically engaged in the transaction that took Court time, that involved discussions and negotiations with the creditors committee, that might have been another opportunity for him to say, 'You know what, if I sell more of this, I'm out, and you guys — all those notes are going to be forgiven,' but he didn't take advantage of that then either.

But here's the deal, Mr. Dondero and Nancy say, fee, the consideration that was given in exchange for this condition subsequent agreement is that it would cause the, quote, utmost focus and attention for Mr. Dondero. It would incentivize him, I think —

(The Court's audio volume greatly decreased at 1:00 p.m.:)

THE COURT: Mr. Morris, if you can hear me, you're frozen.

Are anyone else experiencing the same thing?

(The Court and staff confer.)

THE COURT: (Tapping microphone.) Uh-oh. Okay. If any lawyers out there can hear me, would you speak up? (Tapping microphone.) (Conferring with staff.)

Power the microphone up here.

I don't know if they can see me. Whoops, everything just went off.

THE LAW CLERK: I think our whole system went out. I think they logged me out of it.

THE REPORTER: Hey, I need you up here real quick. Our system just went down again. Okay.

(Back on the record at 1:10 p.m.)

THE COURT: Hey, this is Judge Jernigan.

MR. MORRIS: Yes, I can, Your Honor.

THE COURT: All right. Maybe we're up and running again.

MR. MORRIS: How much time have I spent? I don't know if the Court is keeping track.

THE COURT: About 34 minutes.

All right. So we lost you, we — you were —

MR. MORRIS: Okay, I know where —

THE COURT: — talking about the contingency, the sale contingency that won't happen.

MR. MORRIS: Right.

THE COURT: And then I think you were about to talk about the third-party contingency.

We've got an IT person in here —

MR. MORRIS: Right.

THE COURT: — so if we have other problems, hopefully we can quickly nip in the bud.

All right. You may proceed.

MR. MORRIS: Okay. Thank you, Your Honor.

So, look, Mr. Dondero and his sister tried to say that the consideration Highland was going to get was that he would incentivize, that he would work particularly hard, that he would be motivated, but here is the thing. The evidence, the uncontroverted, indisputable evidence is that Mr. Dondero testified very clearly that on the day each of the agreements was entered into, the portfolio companies were already either substantially or at least moderately higher than cost, meaning that there was nothing to incent.

They also claim, the other piece of it is that somehow Highland benefitted because they didn't have to pay salary. I don't see how that makes sense, as we argued in our papers, they still have to part with the capital. And what Highland was actually deprived of was the opportunity to charge that payment as an expense in order to reduce income. It allowed Mr. Dondero to defer the payment of taxes, but it harmed, actually harmed Highland because Highland had to pay the money, whether it was compensation or in form of the loan, they still are out the 70 million — they're still out the capital that they lent to Mr. Dondero.

But here is the thing, none of it matters because that contingency doesn't apply. The one that would apply, if these alleged agreements actually existed, which we do not believe the evidence supports, it would apply because the portfolio companies are now going to be sold by, you know, Mr. Seery or

whatever successor may come along some day, not that I'm anticipating that. But it's not going to be sold by Mr. Dondero; that's what we do know.

You know we have cited the evidence in the record, we have cited the deposition testimony. I asked Ms. Dondero, who entered, allegedly entered into the agreement on behalf of the debtor, what's in it for Highland, what does Highland get if Mr. Seery sells the assets instead of Mr. Dondero, because Mr. Seery is not motivated to do this, right, he's not getting the pile of money at the end, and her answer —

(Tones.)

MR. MORRIS: — and so we don't think there is any basis. We think the whole thing is manufactured. I'll use the small f fraud. We think that the evidence shows how the sausage was made. There is no explanation for any of these undisputed facts, but even if there were there is absolutely no consideration paid to the debtor.

Let's move onto HCMFA's defense. HCMFA, as we talked about earlier, contends that the notes were issued by mistake and without authority. I'll remind the Court of undisputed facts that I think HCMFA sometimes either ignores or forgets, and that is Frank Waterhouse was an officer of HCMFA. Frank Waterhouse was the treasurer. Frank Waterhouse's responsibility as the treasurer was among the responsibilities, and there is no dispute, I think Mr. Norris testified to this, it's in our

papers, was accounting and finance. He was a fiduciary. No dispute about any of these things.

And we're here on this slide to show the Court the emails, the contemporaneous emails, because we rely on evidence to support our position, and the contemporaneous evidence from May 2nd and May 3rd, the day that these notes were executed, shows exactly what was happening. And this is not a surprise to Mr. Waterhouse, right. The reason that he's not surprised is because he's participating in all of this. And he's participating in all of this, how do we know that, because again no dispute, these emails are sent to corporate accounting. Corporate accounting is an email string that includes Mr. Waterhouse. No dispute about that.

Now I will tell you, Your Honor, that if we ever got to a jury, we'd put Ms. Hendrix on the stand. Ms. Hendrix and Mr. Klos would both testify, I think they did in their depositions, that they would never make transactions of this type without the approval of Mr. Dondero or Mr. Waterhouse, that Mr. Waterhouse gave the instructions. But do not have to go that far. You don't have to resolve what the nature of the instruction was because these documents —

(Tones.)

MR. MORRIS: — that Frank Waterhouse, the fiduciary, the treasurer, the officer, the man responsible for accounting and finance was told contemporaneously that these transfers were

going to be booked as loans and that the accounting department was going to prepare the notes. This is what he's told. It's why he — it's why in none of that long deposition, in none of Mr. Sauter's declarations is there anything where Frank Waterhouse says, 'I had no idea.' That's what a mutual mistake would be. That's not the contention. There's no evidence to support that.

If we can go to the next slide.

Thirty days later, exactly 30 days later Mr. Dondero and Mr. Waterhouse sign their management representation letters, not just for Highland but for HCMFA. And not only did Highland's audited financial statements include a disclosure about these two notes that were created in May, but HCMFA's own audited financial statements make the same disclosure, and that's up on the screen, Your Honor. It's Exhibit 45.

THE COURT: Okay.

MR. MORRIS: And they'll say, oh, but Highland, Highland employees prepared it. At what point does that refrain become completely untenable? I thought it did like months ago, but for them to say that now when only Mr. Waterhouse and Mr. Dondero signed management representation letters did they do any due diligence, how are they going to explain to a jury that Dave Klos and Kristen Hendrix somehow securely conspired to stick into these pesky, little audited financial statements this disclosure? How is a compliant company and a compliant

executive going to stand before a jury and say that he didn't read this, that he didn't know? I don't think so.

Let's go to the next slide, please.

THE COURT: All right.

MR. MORRIS: The evidence that Mr. —

THE COURT: I — I no longer have on my screen your slides. I have a hard copy, but is it just me or everyone —

MR. MORRIS: Okay. It seems to be up on my screen, for whatever that's worth.

Ms. Deitsch-Perez, Mr. Rukavina, do you — I mean you guys have hard copies too.

MS. DEITSCH-PEREZ: It's up on the screen. Maybe what —

MR. RUKAVINA: Yeah, I see it. I see it too.

MS. DEITSCH-PEREZ: Maybe pull it down put it back up again for the Judge.

MR. MORRIS: Okay, we can try that.

La Asia, can you do that, please?

THE COURT: Okay, I got it now.

MR. MORRIS: Okay. So we're on slide 11. And, again, we're talking about HCMFA's allegation that the notes were signed by mistake or without authority or, you know, whatever the defense is. But the evidence that Mr. Waterhouse is fully engaged is overwhelming. And what the Court would have to find is that some reasonable jury somewhere is going to accept Mr.

Waterhouse's testimony on the following points. And remember back on the motion to strike, I pointed out to step one in HCMFA's motion for leave to amend because it said that Mr. Waterhouse wasn't told to treat the transfers as a loan, he was only told to make the transfer. Well, that cuts against him. It doesn't cut for them. And it cuts against them because there is no dispute, there will be no evidence that Mr. Waterhouse was instructed to treat the transfers as compensation. So Mr. Dondero has nobody to blame but himself because he didn't make it clear to Mr. Waterhouse. And Mr. Waterhouse did what Mr. Waterhouse does: He is the financial officer, he is the fiduciary for HCMFA and for Highland. He is in charge of accounting and finance. And he was told to transfer money. That's all he was told. So there can't be a mutual mistake if Mr. Waterhouse was never told 'Transfer the money as compensation.' There will be no evidence that Mr. Waterhouse was confused, that he — he heard the direction to treat it as compensation and it was mistakenly treated as a loan. There will be no evidence that Mr. Dondero gave a specific instruction to treat this as a loan.

And it's in our papers. I don't have it on the screen, Your Honor. If you look at the contemporaneous documentation that the advisors prepared and sent to their clients, it was the advisors and Houlihan Lokey who did the evaluation. There is not even a document that supports the

notion that Highland was at fault. You have a lot of testimony about it. You have a lot of conclusory allegations. I don't think there is a single document that you're going to see where somebody said that Highland is at fault.

The books and records, right, if we can go to the next bullet point, that's what we just saw. Not the next slide, stay on slide 11. That's what we just saw, the second bullet point refers to the two emails that we saw that were sent to Mr. Waterhouse. Again, we think if we got to a jury, the evidence is going to show that Mr. Klos and Ms. Hendrix are very able and — and decent employees and they followed the rules, and they're going to testify that this is what Mr. Waterhouse told them to do. But, again, they don't have to reach that far. We saw the emails.

I want to point the Court to just two other pieces of evidence that I didn't put up on the slide, but if you take a look at Exhibit 53, Your Honor, perhaps when this is over you will see Mr. Waterhouse participating in the discussions on May 2nd about the $2.4 million and that the payment has to come from HCMFA. And then if you look at Exhibit 85, which is another one of Mr. Dondero's written responses to the discovery, and the important point here is I hear Mr. Rukavina saying it has to go through Legal, it has to go through Legal, it has to go through Legal. Well, that's not what Mr. Dondero says.

Okay, we asked Mr. Dondero to, in Interrogatory Number

2, and this is at Exhibit 85, to identify, among other things, the person who drafted the note. And he responded, and I'm quoting: Dondero does not know who specifically drafted the notes. However, he believes they were drafted by an individual in either the Highland Legal or Finance Department. So it's not crazy to Mr. Dondero that somebody in the Finance Department would draft the notes, right, it's just not. The fact is that Mr. Waterhouse knew the notes were prepared because the transfers were booked as liabilities on HCMFA's books and records.

Is Mr. Waterhouse going to be able to explain to the jury either that he didn't know this or that he did it by mistake? Right. And this whole notion of mistake — well, we'll get to it in a moment.

So the transfers are booked on HCMFA's balance sheet as liabilities. Mr. Waterhouse and Mr. Dondero signed management representations, and the notes appear as a subsequent event in the audited financials for the period ending December 31st, 2018. Relying on those very books and records, and this is in our papers, the advisors, not Highland, this is Mr. Waterhouse, this is Ms. Stedford (phonetic), Mr. Norris is on here, I think Mr. Sauter, I don't have the emails in front of me but they're well cited in our papers, they take the HCMFA books and records and they send it to the retail board. Right, so HCMFA actually relied on the books and records to report to the

retail board as to what they owed Highland, and it included these notes.

I think step six of Mr. — I tell you I could go through Mr. Rukavina's six-step process and deal with all of it, but — but I think his — I think his last step is that there were notes on the books for $6 million, and these notes are about $7 million, so people can be confused. I think the phrase he used was people would naturally assume that they were the same thing. I'd like to be in front of a jury and ask the jury if they would have any trouble distinguishing between $6 million and $7 million. I think a jury of ordinary citizens might say that million dollars would make a difference. But be that as it may, here is the important thing, Your Honor. In every single disclosure after these notes are signed, it's not $6 million or $7 million, it's always eight figures, it's $10 or more. It's $10 million or more to the retail board. It's $10 million or more in every single monthly operating report. It's $10 million or more in the schedules. There is no way to confuse 6,- and 7,-, even if that was reasonable, because that never occurred. The number was always 10 million or 12 million. So that's just another specious argument as opposed to facts. It's just argument. And we know the Court will distinguish argument from facts.

Mr. Waterhouse is the person who prepared HCMLP's monthly operating reports and schedules that included the HCMFA

notes as assets. How is he going to explain to a jury how he did that two dozen times? And, by the way, what position does that leave him in having prepared them and signed them and filed them with the Court. Now they're false, even though the entire bankruptcy estate relied on the accuracy of those reports. Not a material error, if they're to be believed.

Then of course you have Mr. Sauter's investigation, right? He comes in in the spring of 2021, completely unfettered. Mr. Waterhouse is no longer employed by Highland. There's no lawyer telling Mr. Waterhouse he can't speak. They meet three times. Three times. And Mr. Waterhouse refuses to accept responsibility for this. He refuses to say that he made a mistake. Mr. Sauter, who has no personal knowledge, we've heard this story before, comes in after the fact with no personal knowledge and announces that Frank made a mistake, but that's not what Frank said.

If you look — if you look at the transcript, if you look at the transcript of Mr. Norris, right, I got him to admit and then I got Mr. Sauter to admit based on that transcript that Mr. Waterhouse was crystal clear, he knew exactly why the notes were created. He knew exactly why the notes were created. I don't know how they're going to explain that to a jury.

Let's move to the next slide, a couple of other — the special arguments, Mr. Waterhouse was not authorized to sign the HCMFA notes. Let me get this right, Your Honor. He was an

officer of HCMFA. He was the treasurer of HCMFA. He was a fiduciary. He was the person responsible for accounting and finance, and they say he wasn't authorized. Other than the words out of Mr. Dondero's mouth, what evidence is there to support that? Not only is there no evidence to support it, but it is directly contradicted by everything we heard last week.

Mr. Dondero — Mr. Waterhouse signed agreement after agreement after agreement on behalf of not only HCMFA but on behalf of Highland. He signed shared services agreements, one of which is in evidence in this case. He signed subadvisory agreements. He signed payroll reimbursement agreements, agreements that Mr. — that not only did Mr. Waterhouse sign but that HCMFA is somehow trying to collect money on. How is it? Where is the evidence that says Frank Waterhouse is — and I don't have to remind the Court that Mr. Dondero didn't know anything about anything — where is the evidence in the record that shows that Mr. Waterhouse could sign all of those agreements but he couldn't sign these promissory notes? Those agreements, by the way, that required HCMFA and NexPoint to pay a multiple of the promissory notes at issue, so it can't be the amount. I mean there's no evidence of any kind, frankly, that his wings were clipped by Mr. Dondero.

He also signed other notes, so it can't be he's not allowed to sign a promissory note because there are other notes in this case that Mr. Waterhouse signed that they don't dispute

his ability to sign. So we think the whole idea and apparent authority, I mean there is no evidence for the notion and it's contradicted by the evidence.

They also say, ah-ha, ah-ha, Mr. Waterhouse's title or — or the HCMFA name at the bottom isn't clearly articulated. Again, Your Honor, they are grasping at straws. The undisputed facts, if you look at the notes that Mr. — that have Mr. Waterhouse's signature, and I'll leave it that way, because that's all I think we have to prove is that his signature is on it, he is an officer and that he was — that he had at least apparent authority to enter into these agreements, that he knew about them, that it's not a surprise to him, he doesn't contend that he didn't know what was happening, right. None of that is going to be in the record here.

So they say, ah, ah, Mr. Waterhouse, it just says maker. But here's the thing, if you look at the notes, Your Honor, obviously maker is a defined term. The definition of maker is HCMFA. Mr. Waterhouse's electronic signature is used for other notes in the same way without dispute. Mr. Dondero, as we just looked at, on Exhibit 85 has admitted that Highland's Accounting group is authorized to prepare notes, right, otherwise he wouldn't have submitted that interrogatory response. Based on the audited financials, the books and records, the statements to the retail board, the uninterrupted string of bankruptcy filings prepared and signed by Mr.

Waterhouse, I mean I don't think there is any basis for the argument, but it's they should be estopped today from coming in and denying the enforceability of these notes.

Let's move to the next defense, is breach of shared services. You know somehow HCMS and HCRE have gobbed onto this defense. There is no shared services agreement in the record. There is no shared service agreements in the record. There is no competent evidence that shows that is shared services agreement exists. I think if Your Honor were to look at the record and look at my examination of Mr. Dondero, because I asked him about this, he said, you know, they — they — the consideration that Highland received is like a reputational benefit, or something like that. I mean it's just — it's a bunch of nonsense. And there is no evidence in the record that there is a shared services agreement.

There is one for NexPoint, no doubt about it. Article 2 sets forth very clearly what Highland's duties and responsibilities are. And if you just look at the evidence, not argument, if you just look at the document, I think every single entry begins with the word "Assist" or "Assistance" or "Advice," or something like that with respect to certain services. To this day, HCMFA — I mean, I'm sorry — the term note defendants have failed to identify any particular provision of the shared services agreement that not only authorized but obligated Highland to make payments on their behalf without any

instruction or direction of any kind by them. According to them, Highland really could have done just about anything to pay any obligation that they felt was due and owing by them. I think it's a ridiculous reading of the agreements. And I'll wait to hear if counsel actually identifies a provision in the NexPoint shared services agreements that they believe not only authorized but obligated Highland to make these payments.

If there were any doubt, Your Honor, Section 2.02 of the NexPoint shared services agreement specifically says that for the avoidance of doubt, Highland shall not provide any advice or perform any duties on behalf of NexPoint other than the back and middle of the services contemplated herein. Okay, so if it's not in the agreement, they're prohibited from doing it. Highland followed these provisions in practice throughout the bankruptcy case. Don't take my word for it, take the defendants' evidence.

Can we please put up Exhibits D and E. So these are exhibits that are attached, I think, to Mr. Aigen's declaration. And if we could just start at the first — the first email. You will see that it's dated — no, up at — either way, that's fine. Just give me one minute and stop scrolling.

So here is an email that was originated by Ms. Hendrix. And this was the practice. And, you know, we heard about this last week. Ms. Hendrix would write to Mr. Waterhouse and she would say, "Here are all the payments that I'm going to

make. Is it okay." And Frank Waterhouse would literally have to approve it. So — so let's scroll up. This is, "Okay to release," she asks.

Frank Waterhouse says okay. That's December 23rd. Let's just scroll up and see a few more. Keep going. Keep going. So here's another one. "Okay to send." Right, Kristen Hendrix asking for permission to make payments on behalf of HCMFA, HCMS, right, all of the nondebtor entities wanting permission. Frank says okay.

Keep going. This is December 1st. "Okay to release," she asks Mr. Waterhouse. Ms. Hendrix doing her job. Mr. Waterhouse doing his job. Okay. Right, so their contention that Highland was not only authorized but obligated to make these payments is belied not only by the contractual language but by the undisputed evidence that they have put into the record that shows that Kristen Hendrix always sought Frank's approval before making these payments. That's — that's the facts, and this is December 2020, but there's more. Of course there's more, because there is no dispute that Highland was ever instructed or directed to make these payments at the end of 2020. In fact, the evidence is crystal clear, that no payment was made because of Mr. Dondero's direction, right.

The Court doesn't have to resolve the debate between, you know, Mr. — you know, Mr. Waterhouse and Mr. — it wasn't made because he said so. And here is the funny thing. We have

put it in our reply papers, Your Honor, it's Highland actually believed that it had not only the authority but the obligation to make payments on behalf of these entities. Highland surely would have paid itself on all the demand notes, right? Is there any reason why it wouldn't have paid itself on December 10th, when Mr. Dondero failed to respond to all of the demand letters? Right, HCMS has all these demand notes. HCRE has all these demand notes. Why didn't Highland just pay itself?

Can you imagine what Mr. Dondero had done if he woke up on the morning of December 11th and he found out that Highland had helped itself to all of these nondebtor affiliates' cash because he didn't respond to the demand letters? How is he going to explain to that jury? He's going to tell the jury that's what he wanted to happen, that's what he expected to happen. It can't just be with the term notes. It's got to be either they had the ability to do it or they didn't. Clearly Highland and Mr. Seery didn't think they had the ability, because if they did, they would have. Right? Why wouldn't they? There is no defense that should be put before the jury on shared services.

Let's go to prepayment defense. There is no dispute the terms of the notes are absolutely unambiguous. They required the maker to make an annual installment payment at the end of the year of accrued and unpaid interest, and one-thirtieth, I believe, of the principal.

The term notes also provided that the parties could renegotiate. I think it's paragraph 3, although forgive me if I get that wrong. And it said the maker may prepay in whole or in part the unpaid principal or accrued interest on the notes. Any payment of the interest shall be applied for unpaid accrued interest thereon, and then to unpaid principal here. This is it. Clear and unambiguous. So the parties could agree to do something differently.

And, you know, Mr. Klos in his first declaration addresses the NexPoint issue. And, frankly, it's done at the same theory, so no harm, no foul, I guess.

And just look at the amortization schedule, Your Honor. There is not a single month where interest doesn't accrue. The last payment made by these entities, these so-called prepayments, was back in 2019, right. Just look at — we just encourage the Court to look at the amortization schedule and ask itself why, based on the contractual language, they could have ever suspected that interest was no longer going to accrue because it was prepaid and eliminated in 2019 and 2020. In fact, you'll see on the amortization schedule in 2019, even though there is enormous payments that are made at the beginning of the year, the term note defendants are still required to make the interest payment that's due at the end of the year, right. They're treated as having prepaid the principal, but interest continued to accrue. Interest always accrues. And so even

under Mr. Dondero's watch, in December 2019, the term note defendants, they do what they're supposed to do, and they make the payments.

And the fact that payments were due at the end of 2020 wasn't a surprise to anybody. It's not like somebody can credibly come in and say, oh, gee, we didn't know that these payments were due. And how do we know that, Your Honor? Because Highland prepared 13-week forecasts. They were prepared under Mr. Waterhouse's direction. We've put one example before the Court. I think it's Klos Exhibit C. And if you look at his — and this is, you know, the first unobjected to declaration, declaration paragraph 13, Exhibit C. And he explains that all of the payments that were due at the end of 2020 were fully incorporated into the 13-week forecast. So, again, you know, poor Mr. Waterhouse is going to have to explain to adjacent why that he was completely unaware that these payments were due. It's not going to be good.

So that's the prepayment defense.

And just quickly, Your Honor, ambiguity. You know Your Honor can look at the evidence in the record on this point. We have cited all the places in Mr. Dondero's deposition where he refused to engage on the topic, insisting that he wasn't a lawyer. You know, in fact, Mr. Dondero stated pretty explicitly that he didn't read any of the notes before he signed them, so I'm not sure how the ambiguity now can possibly be a credible

defense because it's not ambiguity that he was even aware of at the time he signed all of the notes except for the handful of notes that Mr. Waterhouse signed. We don't think there is any ambiguity. They haven't pointed to anything meaningful.

There is partial performance. You know it's partial performance, Mr. Dondero has admitted to partial performance in response to an interrogatory. And of course in our reply brief, we show that the defendants paid, I think, $40 million back on these notes and other notes prior to the petition date. So you've got performance. You know there's just not much more to say on this. So unless the Court has any questions, at this point I think I've used approximately an hour and five or an hour and 10 minutes. Can I just get confirmation of that? And then I'll rest and save the downs for rebuttal.

THE COURT: All right. Nate, can you confirm?

(The Law Clerk confirms off record.)

THE COURT: Okay. Nate says an hour and five minutes.

All right, we'll take a 10-minute break and come back and hear from the defendants.

COURT SECURITY OFFICER: All rise.

(Recess taken from 1:40 to 1:51 p.m.)

COURT SECURITY OFFICER: All rise.

THE COURT: Please be seated. All right, we're back either/or in the Highland note adversaries. I'll hear from the defendants at this time.

All right, can you all hear me?

MS. DEITSCH-PEREZ: Yes, Your Honor, I can hear you.

MR. ROOT: Yes, Your Honor.

THE COURT: Very good. You may proceed, Ms. Deitsch-Perez.

MS. DEITSCH-PEREZ: Okay. And I'm going to ask Mr. Aigen to pull up our PowerPoint. I was not aware that Mr. Morris was going to provide them in advance to the Court and the parties, so we have not — we will look at our PowerPoint to make sure all of the notes and comments are out and circulate to them — circulate them to everyone for their records after the argument and after we've made sure to scrub them of our notes, —

THE COURT: All right.

MS. DEITSCH-PEREZ: — our internal notes. Thank you.

THE COURT: Um-hum.

MS. DEITSCH-PEREZ: Okay. And if — we have a couple of hitter slides, please. Mike can go to page 3, start on page 3.

And if you step back here and think about what we just heard, it sounded a lot like a jury argument. It sounded like an opening statement at trial, because that's — that's what it really was, that the debtor doesn't believe Mr. Dondero or anyone related to him or even associated with him, and is counting on the Court feeling the same way. And I think that situation has emboldened lawyers who surely know better to make

a motion for summary judgment on the grounds that the defendants' witnesses and evidence are less credible, less credible than the plaintiff's evidence; and that the inferences to be drawn from the evidence that plaintiff proffers are better than the — and stronger than the inference — inferences from the evidence that the defendants' witnesses bring forward. And those kinds of things are the very factors that bear on whether you win or lose at trial.

And if we were hearing about this, about some other set of lawyers in some other case, we'd probably all laugh and say what are they doing, that's a waste of everybody's time to move for summary judgment on which side is more credible than the other, because that's classically an issue for trial, not for a summary judgment motion. So let's see, let's look at the arguments that the defendants make and the evidence and the case and what plaintiff argues about it.

So one thing that the defendants argue is that the agreements don't exist; but, in fact, Jim Dondero and Nancy Dondero, both sides testified that they exist. They identify the essential terms.

The debtor makes a big deal about the agreement supposedly being secret; we'll see how they weren't.

The debtor makes a big deal about the absence of notice of possible forgiveness on the financial statements. That's not a basis for summary judgment. Might be an

impeachment point at trial, not summary judgment.

The debtor talks about voluntary payments, we'll address that. That's not a basis for summary judgment.

We heard Mr. Morris talk about the fact that Jim didn't demand forgiveness when there was a relatively small stock sale that was — that was basically forced. He didn't make a demand maybe he could have made; that's not a basis for summary judgment.

Whether or not Nancy Dondero looked at the notes when she entered into agreement, that's maybe — maybe an impeachment point at trial, not a basis for summary judgment.

And there's evidence that agreements to forgive loans as part of compensation on the occurrence of future events like performance was a practice at Highland and related companies.

Defendants also talk about whether the agreements are definite. Not much — we'll see the cases, not much is required for agreements to be sufficiently definite to preclude summary judgment.

And — and the argument that Mr. — that the plaintiff makes that the agreements are not supporting by a meeting of the mind — a meeting of the minds, that's really the same thing as arguing that there's no agreement. And those are inherently fact issues. And there are actually cases on that. And you will see there was a complete absence of authority in Mr. Morris' presentation.

So let's go on to the next slide.

Okay. We'll discuss the argument about consideration. Conspicuously absent from Mr. Morris' presentation was the second form of consideration that existed for the agreements, which was that Mr. Dondero could have taken more compensation. These agreements were made at comp time, and he was sitting back and looking over his compensation and saying should I take more, I could take more, I would take more. But instead he got this agreement. That's compensation.

There's a half-hearted argument in the briefs, not much made of it today by the plaintiff, that Nancy Dondero was incompetent. You will hear from the defendants the law on what constitutes someone who is incompetent to make a contract. And plaintiff hasn't put in anything in support to show that Ms. Dondero was drunk or a minor or otherwise legally incompetent to make agreements.

And then you'll hear somewhat from me and more from Mr. Rukavina that Highland was responsible for making the loan payments under the shared services agreement. The plaintiff doesn't deny that there was a written shared services agreement for NexPoint. And then says, well, there's no shared services agreement for HCRE and HCMS, as if it were the law that the agreements couldn't be oral or implied over a course of conduct. And that's a very unlawyerly suggestion. Of course we all know that the agreement need not be in writing and could even be

implied from a course of conduct. And the same thing about the prepayment argument. All Your Honor has to do is look at the amortization tables and see how much was paid on these loans. Huge amounts. And so is it fair to say they were in default at that time when, A, Highland could have/should have paid them, and so much had already been paid.

So let's go on now to the specifics.

Okay. Now before we go further, there's actually some background that's helpful to understanding how — how we actually got in this position. And to understand how these notes and then the agreements for potential forgiveness came about, as I think Mr. Morris and the Court both said, context is important. This Court has often said that, well, Mr. Dondero hasn't come to grips with Highland being in bankruptcy. And that's an interesting thought, because it recognizes that until this bankruptcy, Jim Dondero was the heart and soul of Highland.

He and Mr. Okada (phonetic) built it up from very little. And it was something really important to Dallas. It was a financial powerhouse plunk down in the middle of the country. Not in New York or L.A., where people expected those kinds of companies to be. It grew to employ hundreds and it owned portfolio companies that employed thousands. It survived the financial crisis that wiped out much bigger firms. And understanding its culture is important to this case, because it was a culture of compensation based on performance. This was a

culture of compensation based on hard work. It was a culture of growing the business rather than living large.

I remember hearing about Highland in the — you know, many years ago where people — outside vendors griping and maybe even some inhouse people griping that — that they had to fly coach because Mr. Dondero flew coach, because he was — he was putting the company first over his own interests. And so even his distractors acknowledged that Mr. Dondero works tirelessly. And, more importantly, he took ownership and responsibility. And because he was the largest owner, that played a part in how he interacted with the company.

So not to get too far ahead of the program, for example, the debtor claims that Mr. Dondero — the fact that Mr. Dondero made payments on notes that were unnecessary, because of the potential forgiveness based on the agreement, that must mean that the agreement didn't exist. But they're missing the point. That's because — that's assuming that Mr. Dondero would only do what was good for himself and not for the company. Instead, if Highland did cash, he'd make payments on those demand loans even though if they weren't demanded payment wasn't due. The same thing about the terms loans. There was only a certain amount due each year. But you saw that much more than that was occasionally paid. And, A, they didn't have to — on the demand notes, they didn't have to be paid because they were subject to the forgiveness, but he still board — caused them to be paid, or

the ones that were his own, he paid them down. Why? Because he wanted to make sure the enterprise was successful.

So when you hear Mr. Morris say, well, how does Mr. — how is Mr. Dondero going to explain that he didn't act in his own self-interest, that's the answer. That's the answer. He — he did things he wasn't required to do to make sure that Highland was okay. And if it needed the money, he paid it down. So that is in evidence that the agreement didn't exist. It's evidence that he was putting Highland first.

And it's also important to remember that at all relevant times the loans here were modest in relation to the overall value of Highland. If this bankruptcy hadn't been beset by all of the contentiousness that the Court and Mr. Morris have acknowledged by creditors with very personal agendas, by the sharp animosity between the various constituents, by claims trading that maybe skewed the economic interests here, Mr. Dondero expected that he was going to be able to put together a plan that would enable Highland to stay in business, that would pay off all the creditors and move forward.

And so when you look at all of the — the argument that Mr. Morris made about sausage-making and why in this sort of really crisis period of the plan being propounded, negotiations over whether it would be the pot plan or the creditors' plan, or something else, and litigation starting up, and Mr. Morris says, 'Oh, look, they kept changing their story. They kept adding

things and amending things.' Well, of course there was quite a bit of chaos. And so did everything get done perfectly? Not at all. But that's an argument to be made to the jury. Should they have known everything on day one and put it all on the first pleading? Well, Mr. Morris can argue that, but the defendants will point out the incredible pressure that everybody was under on what was the real focus at the time, which was trying to salvage Highland and trying to have it be a continuing entity and having to have these competing plans. And the litigation was the by least of it. And so that's the explanation on the sausage-making.

And any lawyer who tells you they haven't amended their interrogatory answers or forgotten a witness or forgotten a document and had to put it in later isn't — really isn't — isn't a litigator or is maybe a baby lawyer or just hasn't been working enough, because it happens to all of us and it particularly happens when there are a whole lot of cooks in the kitchen, shall we say. And we'll talk a little bit more about that as we go along.

So you also know, I mean the debtor knows and Your Honor knows from presiding over this case that Mr. Dondero did not take the kind of huge bonuses out of Highland that we read about in the newspapers. And we also know that he really was focused on making people perform to get their money.

And so, given all of that, how can plaintiff feign

surprise that Mr. Dondero would set himself a challenge, a hurdle, to gain forgiveness of that — of the notes? It just — it really defies belief.

And I understand that lawyers put on a show for a jury and that's what Mr. Morris will have to do here, but when you talk about something that's not remotely credible, it's not remotely credible that Highland did not expect that Mr. Dondero would plan that he would try to have tax-efficient compensation and that he would plan that if things would happen that would — would result in — in large — potentially really large payments like we've seen with MGM, that he would be able to benefit from that, along with Highland.

So, given all of that, we're not — we're not asking the Court to grant summary judgment for the defendants. We recognize that the debtor disputes the facts alleged by the defendants and that there are facts that need to be decided by a fact finder, and here it's going to be a jury. But by the debtor seeking summary judgment and asking this Court to find facts is just as presumptuous as if the defendants had made the same request. And if the Court granted summary judgment for the defendants, we — we concede it would get reversed. And it is no different that if the Court granted summary judgment on what are hotly disputed issues if it granted summary judgment for the plaintiff. And — and we're going to show you the law, which the plaintiff didn't show you.

So, Mike, if you could go on to the next slide.

Okay. We heard Mr. Morris say almost for the first time today that the — that the agreement at issue here wasn't authorized by the LPA. And I have to tell you there is — Mr. Morris contended that's an argument they're making. It's not in the — you can — you can shake the motion for summary judgment and squeeze it like a sponge, that argument won't come out of there. The sole argument is there is — and I think I tied it somewhere later in this slide show — they say something like and it wasn't authorized. There's no case law, no argument, no nothing. There is a sentence.

So in contrast to that sentence, look at the LPA itself. The LPA gives Dugaboy the right to approve compensation for the GPA of the GP and the affiliates of the general partner. And there is a provision about compensation. And you have to parse through the agreement. You have to look at what the various words in the section mean. So you have to go look at "affiliate," and you will see that that would related to Mr. Dondero. You have to look at "majority interest," and you can see, if you turn to the page that describes it, that that's Dugaboy. And if you go to Exhibit A, that also reflects that the majority interest is Dugaboy. And then if you go look at the Dugaboy trust documents, you will see that as of — starting as of 2015, Nancy Dondero is the Dugaboy trustee and, therefore, the individual entitled to approve the compensation. That was

in the LPA, going back to 2015. I think it was in there before that. That's — that's Highland's operating agreement. If they didn't want that, that shouldn't have been the operating agreement. But that is the agreement.

And if we go on now, it defies belief that the debtor says there's no evidence, because there is evidence. Mr. Dondero testified and Ms. Dondero testified about the agreements and what they were. And we'll look at that as we go along. And the agreement was that the notes would be forgiven if Trustway Cornerstone or MGM sold at above — at or above cost. Mr. Morris made some somewhat confusing assertion that that part of the agreement didn't apply here because it wouldn't be Mr. Dondero doing the selling. There is nothing in the agreement as described that says that. But putting that aside, there is no argument in the motion for summary judgment that supports what Mr. Morris said in today and in a footnote that the indisputable fact is that Ms. Dondero did not have the authority to bind Highland. What we just saw on the prior slide is exactly why Ms. Dondero was the person who could do that.

So let's go on to the next slide.

Okay. So, again as I said, both Nancy and Jim testified to the agreement. And in Texas, and I'll show you the cases in a minute, even if you had a he said/she said dispute, where one side on a contract — on a contract said, 'I made that contract,' and on the other side the other person said, 'No, I

didn't make that contract,' the testimony of the one person is actually enough to preclude summary judgment. And the reason for that is that the Court is not entitled to evaluate the credibility of the witnesses and the relative weight of the evidence. And there's also no requirement that the contract be in writing.

What the debtor points to are facts that the jury might consider in deciding whether there was or wasn't a contract. They might be convinced, they might not be convinced.

Let's go on.

Okay. So now let's look at the applicable law, something that the debtor did not do with you. We have the In re Palms case. Now that was an actual trial where the court is a the trier of fact on a proof of claim. And one party said there was an oral contract and the owner denied it. The architect said there was a contracted design. The owner said, no, there is not. And the court held that whether there was a meeting of the minds is a question of fact. And even if there was a missing term, that would not be dispositive. So when the debtor says here, 'Oh, not — you know, Mr. Dondero didn't recite every term in his deposition,' that's not dispositive for a few reasons. One, that's only talking about what he could remember at the time. But, two, we're at summary judgment, we're not even at the point of trial. And this case says it's an issue of fact.

And then Fisher versus Blue Cor- — Cross (phonetic) applies the Palms case in a summary judgment and again reiterates that whether or not there is a meeting of minds, that's something for a jury to decide.

Bucsany (phonetic) is even closer. There there is a written construction contract that required change orders and for amendments to be in writing. Think of that as the parallel to the note. And then after that there was an oral contract for additional work. And the owner contended that the notion that there was an oral contract was inconsistent with the written contract and that must mean there was no oral agreement or that it was unenforceable. And the fact-finder found that an oral contract for additional work is something a jury could find.

Senta Alsud (phonetic), another case that's helpful here. There there was a party that made a loan and also put a downpayment towards a transaction. And the party that wanted to be repaid and wanted the refund of the downpayment moved for summary judgment. And there was, like here, conflicting testimony on whether or not there were conditions on repayment, because that's what at issue here, whether there are conditions to repayment, and there were also issues of a similar issue there on the — on whether or not the downpayment had to be refunded, and the court denied summary judgment because conflicting testimony creates a genuine issue of material disputed fact for trial. And — and that's — that's what we have

here.

THE COURT: Let me — let me ask you —

MS. DEITSCH-PEREZ: Now —

THE COURT: — let me ask you a question, because until you got to this case I was going to ask you do you have any cases where an oral agreement was grounds to avert summary judgment on a suit on a note because, as we all know, you know we said it before, suits on promissory notes are, I think, widely regarded as the simplest kind of lawsuits. There are typically, and they — you know the Fifth Circuit has said they are grist for summary judgment. So I was going to ask you do you have any cases where an oral agreement that was alleged to exist to be a defense to repayment was accepted as grounds to avert summary judgment. So —

MS. DEITSCH-PEREZ: Yeah. And — and that's why we gave you these cases. They're not going to be a lot —

THE COURT: Well, as best I can tell, none of these cases except maybe Alsud involved a promissory note. Okay, they're contracts.

MS. DEITSCH-PEREZ: Yeah.

THE COURT: But this one, was it a suit on a promissory note, essentially, that oral amendments —

MS. DEITSCH-PEREZ: I mean there was —

THE COURT: — were argued and the court said, okay, we'll go to trial?

MS. DEITSCH-PEREZ: Well, it was — it was a case in which there was a loan. And one side said you have to pay it back and the other said, no, there were some conditions on it that were oral. And so it went to trial. And, I apologize, I don't know what happened at trial. But the fact that there aren't many cases like that, Your Honor, is because, you're right, often — often promissory notes are simpler cases, but this is most assuredly not a simple case. And so — I mean this is — you know the notion that you can have an oral agreement, I think laymen are confused by that and there's a prejudice, I think, that people — people think that if it's not in writing, oh, boy, maybe it didn't happen, but particularly in Texas we know — we know that's not true, that oral agreements even for big amounts can be binding. You remember Joe Jamal (phonetic) taught us all that.

But even more specifically in a he said/she said dispute, the testimony of one side is enough. And so if we take all the hyperbole and emotion out of this and maybe make this something that seems simpler, let's say I agree to sell my $10,000 car to Mr. Aigen, if he writes — if he wins 10 motions over the next five years. And I don't tell anyone and he doesn't tell anyone. Well, the fact that we didn't tell anyone about this doesn't mean there's no agreement. It's not even evidence that there is no agreement.

Now let's say I also do a financial statement and I

list my car as being worth $10,000. Is that evidence on which a creditor of mine could get summary judgment that there was no agreement, so they could go and grab the car? Of course not, we wouldn't think so —

THE COURT: I guess — I guess what I'm trying to get to here is context matters, this isn't any old contract. This is — you know we start with the prima facie case, that this is — these are promissory notes. It's not a typical —

MS. DEITSCH-PEREZ: And it —

THE COURT: — it's not just any old breach of contract suit, it's a suit on a note where, you know, is there a note, did the nonmoving party sign the note, is the movant the legal owner or holder of it. And, you know, here's the balance due. And that's considered under the law a prima facie case. Well, you know, again I'm trying to get at do we have any developed law that you can use an oral agreement to defend against this very basic kind of transaction in society. I hate to get melodramatic —

MS. DEITSCH-PEREZ: Yes, of course —

THE COURT: — I hate to get melodramatic and talk about the slippery slope, but it kind of feels like commerce would come to a screeching halt if every defendant could come in and say, you know, I had an oral agreement with the banker, or whoever, that the note as written —

MS. DEITSCH-PEREZ: But — but that was —

THE COURT: — the note as written was not going to be binder. I mean we would never have such —

MS. DEITSCH-PEREZ: But there are doctrines, there are legal doctrines that deal with that, and that's why this is such a complex case. I mean that's where a lot of the lender liability were about and were people able to prove a subsequent agreement, and that's allowed. I mean parol — parol evidence is only barred in certain circumstances. Even the debtor doesn't argue that that applies here.

So I think we are in open territory where the question is will the trier of fact believe that there was an agreement. And we're going to show you the things — you know, the debtor showed you things to make it appear as though there was an agreement and to convince you there wasn't an agreement, and to say that Mr. Dondero is incredible, and I'm going to go through this now and show you the reasons why you should think it happened and why it made sense and why he did certain things and why the companies did certain things. But those are facts that a jury should listen to and say they either believe it or they don't. And that was the case in many of these lender liability cases where somebody said, 'Wait a minute, the — the bank told me that if I went and I did x, y, and z, they weren't going to call my loan.' And we all know that — that a lot of those cases succeeded because subsequent agreements did occur.

THE COURT: Okay. Well, I — this is a subject near

and dear to my heart. I just wrote a 140-something-page opinion on lender liability and I know it's darn hard win with liability.

MS. DEITSCH-PEREZ: Um-hum.

THE COURT: You usually just kind of look at the agreements —

MS. DEITSCH-PEREZ: I know, and — and — and I understand that. And I think that's because of the prejudice that, boy it's in writing, you know, you should be stuck with the writing.

But we also all know that in reality, things happen. And so some of those lender liabilities cases were real and people really got hurt when the lender didn't, you know, — made an agreement and then wasn't going to live up to it. And the same thing here, Mr. Dondero could have taken more compensation. It's not — I'm not sure I understand what Mr. Morris was talking about when he was saying the consideration was just that he was going to try harder and that he got the loan. The consideration was the fact that each comp period and each end of year, January, February, he could have — he could have asked and gotten a whomping, big, fat cashed check then. He could have taken more compensation. And instead of taking more compensation at the time, he said, you know what, I'm going to take it on the come, I'm going to get this agreement to make my loans potentially forgivable if good things happen, instead of

taking cash out now.

He could have had unconditional cash as his compensation. And instead, he took these agreements. And so now the debtor wants to take it because and, you know, after he forewent taking his compensation, they're going to say, 'Ha, you can't have your other compensation either.'

And it's not like this was a sure thing. Mr. Morris talks about the portfolio companies being in the money at any given moment. Well, we all know that that's not a sure thing. Look at 2008. Look at the huge drop in the market when COVID happened. Look at what's even happening now with the Ukraine. The fact that in any given moment the portfolio companies were in the money doesn't mean that there was no consideration, because that — the consideration is the fact is — that Jim could have taken sure cash, and he didn't. He decided to wait for his reward and now the debtor wants to take it away.

And did he do it perfectly, would it have been safer, better, more careful, more prudent to have written them down, to put it in the financial statements to say this, that, or the other, — I'm getting ahead of myself — but, yeah, sure, maybe it would have been, but he — but it was also the case that until the contingency occurred, they were straightforward notes, and so they got put in the books as straightforward notes.

And in the PWC deposition, Mr. Morris suggests without actually showing you anything, that — that the PWC folks would

have wanted to know about the forgiveness condition.

And I will grant you, you know, with a little cute questioning he got the PWC accountant to say that, but not 10 minutes later, when Mr. Aigen cross-examined him, he said, 'Oh, I didn't understand the question. I meant that if the forgiveness event occurred, I would want to know about that, not if there was some future potential possibility of the notes being forgiven.'

Now was that a bad judgment call on Mr. Waterhouse's and Mr. Dondero's part, to not say to the accountants then, 'Gee, there is this agreement. What should we do, should we write it down or not?' yeah, maybe. I mean we wouldn't be here if they had made this clearer. But that doesn't mean that the agreement doesn't exist. And it also doesn't mean that it isn't — it isn't enforceable.

You know the debtor argues, 'Oh, my God, there's no disinterested party witness.' I mean that's even sillier, because in most contract cases, think about who the witnesses are. The witnesses are the interested parties, they're the people to the contract or who say there isn't a contract. It's almost always the interested parties that are the witnesses.

I think I've gotten a lot of off track, but I can — I can get myself back on. So give me a minute, I will tell Mr. Aigen what slide to go to.

Okay, why don't we go to 12. And if we come across

things I've already covered, I will go really quickly over them.

So I mean I'm not going to read all of these to you, but, Your Honor, in the briefs you will see — and I don't think that the debtor seriously disputes that at least Mr. Dondero and Nancy Dondero testified as to the existence of the agreement. And we'll send you the PowerPoint and you'll have the — the aid memoirs on where that is.

And if you go on to 13 and 14, these were — there are here the parallel declaration testimony for Nancy. And if you go to — I think that's on 13, 14 have the declaration testimony. And if we go on to 15, okay, the debtor made a fuss and said, 'Oh, there are some that they said that Mr. Dondero didn't really know about the notes.' And — but you have to look at what the question really was. He says, he asked, "I'm asking" — this is Mr. Morris asking Mr. Dondero — "I'm asking if during your discussions with the Dugaboy trustee you ever disclosed the name of the maker of any of the notes that were subject to the agreements."

And Mr. Dondero answers, "She knew that the notes due to — that she knew they were notes due to Highland from various entities, so I don't know what your question is, but identify specifically that there were notes due to Highland? I guess the answer to that is yes, but I don't know what you're asking me."

It's clear in that little snippet that in the briefing the debtor tries to make much of it's clear he got confused by

the word maker. He didn't — you know, maker, payee, he wasn't — and then Mr. Morris never made the question-clear, so it went nowhere, and now the debtor says, 'Ah, he didn't even know who was on what side of the notes. That's just clearly not true.

And I have to tell you, even myself, you know, when someone says mortgagor and mortgagee to me, it takes me a minute, I have to — or maker, I have to think for a minute which one is that. I'm not a real estate lawyers, I don't use those words all along. And we shouldn't be deciding things as important as this based on — on kind of gotcha — gotcha deposition questioning. If anything, what it shows is Mr. Morris wasn't listening to the — to the answer to the question.

So if we go on to 16 now.

Another tactic that the debtor takes is tries to create a summary judgment issue by saying Nancy and Jim disagree about the notes are subject to the agreements, that the deposition testimony doesn't show that, and then Mr. Dondero specifically says in his declaration that he did discuss and identify the notes that were subject to the agreement to Nancy. So that's also not — not a reason to grant summary judgment.

We go on to 17.

Okay. Another thing that — that the plaintiff does is it makes a big deal about the fact that Mr. Dondero couldn't list which note was on which date for how much, to suggest that the agreements must not have taken place. But that's clearly an

attack on Jim's credibility, which is improper at this point. And that takes us back to that Alsud case that you looked at before, Your Honor. And it's important to look at what it actually say is, which is to determine whether a genuine dispute exists such that the case must be submitted to a jury, courts must, not might or maybe, courts must consider all of the evidence in the light most favorable to the nonmoving party, that is, Mr. Dondero and the companies, draw all reasonable inferences in light of the nonmoving party, refuse to make credibility determinations, or weigh the relative strength of the evidence. And that's — think about how many times you heard Mr. Morris say something wasn't credible or that the plaintiff's evidence was stronger or more voluminous than the defendants'.

The plaintiff is asking you to do the very thing the courts say that the law prevents you from doing. You can't — you can't say, ew, I find — I find the plaintiff's arguments more credible here, I find Mr. Klos' declaration as more credible than Mr. Dondero's testimony. That's not the purpose of the Court on a motion for summary judgment, and that's true whether this is a bankruptcy court or a district court. The plaintiff, the debtor here is trying to lead you astray and I just ask that you not be dragged along this road —

THE COURT: Let me ask you —

MS. DEITSCH-PEREZ: — and —

THE COURT: — to address head on I think a more

nuanced argument that Mr. Morris is making. He says, 'I'm not asking the Court to make a credibility assessment,' that he is saying this, quoting Fifth Circuit law, he says I'm supposed to focus on is there a dispute about a genuine material fact, stressing the word "genuine material fact." And he cites Fifth Circuit law that says if a reasonable jury could not possibly return a verdict in favor of the nonmoving party, then that's not a genuine dispute of material fact. What is your response to that?

MS. DEITSCH-PEREZ: The response is that can't mean that the — that the movant can say, 'Well, look at all of this evidence and look at all of that evidence, and this evidence is more credible than that evidence.' That's what Mr. Morris did. He may put that law up on a slide, but what he actually did was he pointed out various situations and said, 'Boy, someone looking at that would think Mr. Dondero's going to have a hard time explaining it.' That is the epitome of saying it's not credible, that one side is more credible than the other. And just by saying, 'Boy, this is hard to explain,' doesn't make it not genuine.

There's a little bit of word play here. I mean the debtor is still asking you to make a credibility determination, that you should look at all of this evidence and say, 'Hmm, do you think it happened or didn't you think it happened,' in the face of testimony that it happened. There are two parties in

the conversation about this agreement and both of them say it happened. You don't really have a choice but to say this has to go to a fact-finder.

THE COURT: All right. Well, I may —

MS. DEITSCH-PEREZ: Because Your Honor is not the fact finder —

THE COURT: — I may — I'm going to ask you another question. I'm going to ask you another question. There's also plenty of case authority that says if — if the only thing that seems to create a material fact dispute are affidavits with conclusory, self-serving statements, then that's not enough, okay. So —

MS. DEITSCH-PEREZ: But that's not what —

THE COURT: I think what I hear you saying is —

MS. DEITSCH-PEREZ: — that's not what this is.

THE COURT: — when — you know, when I've got any testimony, I've got put it to a jury. But yet there is a nuance there that courts sometimes recognize, right?

MS. DEITSCH-PEREZ: I think those cases are ones where you have bet — where all you have a declaration that is after the fact. It's not where you have deposition testimony that establishes the disputed issue. Sometimes you'll have an instance where parties will — will not give testimony on whatever the issue is. And then afterwards, when it's pointed out in a motion, they will either contradict themselves or they

will say something that's never said before in a declaration, and that's where you have those cases.

It's not — it's not where you have deposition testimony that is — that does — that puts — that creates a live issue. I mean this Court is just not entitled to sit here and say, 'I just — I don't believe Jim Dondero and I don't believe Nancy Dondero.' And — and that would be wrong. That would be taking something on which they have — there is a right to a jury trial away from them. I don't know how to say it.

And, not only that, it's not like that is the only evidence, because there is the evidence of the — of the expert that indicates that Mr. Dondero was under compensated. There is the evidence of the tax expert who explains that if you want to have tax-efficient compensation, you would have a bonafide note and you would have to make it subject to a condition subsequent, because otherwise Mr. Morris is right. If it had been a different kind of agreement, if it was searched, that the note was going to be forgiven, then there would be taxes owed on it right away.

So if you look at those things, it's not just Mr. Dondero's testimony and Nancy Dondero's testimony, it's extraneous factors that also allow you to — allow not you — allow a fact finder to find that, yes, that is how he was — how he wanted to structure his compensation and that Highland, which — you know for most of the time period, he was the largest

shareholder and he was its CEO. He had ever reason to ask them and Highland had every reason to agree to let him structure his compensation thus, because otherwise he just would have taken out more money.

I mean there are a lot of private equity funds where the owners take all the money out at the end of the year and they basically start fresh the next year. That's not what — what Highland did. He was building, you know, what Your Honor has called this giant web, but he was building this big empire, and that required leaving some money in there to be able to do things with. And so he didn't take out every last penny that he could take out. But he shouldn't be punished now for that.

He should be allowed to put it to a jury and have them say, yeah, we believe you did this, or, no, we don't. But, seriously, given what everybody has said about — about Mr. Dondero and about how he wanted to make money, is there really any doubt that he would — he would construct a plan by which he had the chance to have these loans forgiven? I mean seriously, nobody really thinks that he made these loans thinking there was no chance that they wouldn't have to be paid back. Of course he said up a plan where he would have the potential for tax-efficient compensation. I mean to think that — I mean I don't believe Mr. Morris thinks, I don't think the debtor thinks, I don't think Your Honor thinks that he was making — he was taking these loans that he thought for sure weren't going to

have to be paid back. He was doing something where he thought he would have the ability to turn them — or to have be turned into compensation if — if Highland succeeded in the way that he hoped it would.

THE COURT: Anyway, —

MS. DEITSCH-PEREZ: And I ask you to think about that when you think about whether it's credible —

THE COURT: We're — I am thinking about it. We have 16 notes that were talking about in this litigation.

MS. DEITSCH-PEREZ: Um-hum.

THE COURT: It's roughly $70 million worth of notes.

MS. DEITSCH-PEREZ: Um-hum.

THE COURT: And it all — well, let's see. There was one November 2013 note, but with that one exception, they are all within two and a half years of the bankruptcy, 2017, 2018, 2009 [sic], so $70 million of notes, mostly in the two and a half years before Highland is in bankruptcy. And, again, you know, context matters, Highland's hurdling towards bankruptcy or the zone of insolvency at some point — well, anyway, I don't know if that's in summary judgment evidence, —

MS. DEITSCH-PEREZ: I — it's not, right —

THE COURT: — evidence —

MS. DEITSCH-PEREZ: It's not, Your Honor, exactly —

THE COURT: — in this case. But the point is $70 million of notes, all —

MS. DEITSCH-PEREZ: Your Honor, that's —

THE COURT: Let me complete my thought.

MS. DEITSCH-PEREZ: I know.

THE COURT: It's taking me a lot to get it out —

MS. DEITSCH-PEREZ: Well, I apologize.

THE COURT: But 70 million of notes, 16 notes, all but one is within two and a half years before the bankruptcy is filed. And the defense is, the defense that requires this to go to a jury in — in your client's estimation is there was basically a secret oral agreement between Dondero and his sister, who had no management role at all with any of these entities, but was the trustee of his family trust, which is the majority owner of Highland, there was a secret, oral agreement that these don't have to be repaid. And never was this agreement — never was this agreement disclosed to the other officers of Highland or these makers. And, in fact, they never showed up, the oral agreement never showed up in a footnote or anywhere on — on audited financial statements or bankruptcy schedules that are signed under penalty of perjury, or monthly operating reports that are filed under penalty of perjury, nor in any objection to the disclosure statement or plan when objections were made about feasibility.

So that — I mean, again, I'm just trying to assess does this need to go to a jury. That's what Judge Starr is going to want to know. Did I correctly encapsulate your —

MS. DEITSCH-PEREZ: And —

THE COURT: — your defense?

No. Okay, what —

MS. DEITSCH-PEREZ: No, because — no. And the reason the answer is no, because you — there was an important sort of assumption buried in there. You said that these notes would be forgiven. And the — and the fact is it was not the — the agreement was not that the notes would be forgiven, —

THE COURT: They might be, they might be.

MS. DEITSCH-PEREZ: — they would only — exactly. Exactly. And so, for better or worse, they didn't think it — I mean Mr. Dondero testified he didn't — for that reason didn't think it was material because they might be, they might not be until the condition was triggered. They were just — they were just notes. And so could he have been wrong in that assessment? Yeah, I mean maybe a cons- — a more conservative person would have said, 'Ew, you know, this could be forgiven.' But he didn't. But that doesn't mean summary judgment should be granted against him. It means that's a fact that the fact finder is going to consider in whether or not they think this happened. You have to balance that against do you really think he didn't make a plan where he had the potential for more compensation? That doesn't sound very much like Mr. Dondero. So it's not quite as cut and dry as Your Honor posited.

It's also not true that it was secret, because while

it was not a fulsome disclosure, Mr. Dondero, before this all became an issue, did tell Mr. Waterhouse that, 'Wait a minute, these might end up being compensation.' Now did he sit down and tell him chapter and verse? No, but it's undisputed, nobody's challenged the fact that he did tell that to Mr. Waterhouse. And that is evidence of the agreement and that he also told —

THE COURT: So that where is that — where is that evidence? Where is that evidence? When —

MS. DEITSCH-PEREZ: It — it —

THE COURT: And how did he tell Mr. Waterhouse?

MS. DEITSCH-PEREZ: There — there — he — there is testimony from Mr. Dondero, and in our next break I'll find the page and line number and the appendix. There is testimony from Mr. Dondero that he told Mr. Waterhouse that the agreements were potential compensation, you know. And — and you heard Mr. Morris concede that during his opening, but we'll get you the actual page and line. And then Mr. Waterhouse —

THE COURT: But it's just testimony. It's just testimony from Mr. Dondero.

MS. DEITSCH-PEREZ: And then you also have Mr. Waterhouse saying that, yes, Jim said something to him in the context of when they were discussing putting up a competing plan, that he shouldn't be counting the notes as money that was due to Highland because they were potentially going to be compensation and they should take that into account in doing the

pot plan.

So that's something before we were in this litigation fight that indicates there was some kind — something out there that might have converted these notes into something less than straightforward, plain vanilla pay your money notes.

And then on top of that, and I will concede this is after litigation started, but really before anybody started digging in to investigate the lawsuits and to find out all the facts. When the debtor said something overt about counting on the money, Judge Lynn wrote to — I think Pomerantz, not Mr. Morris, Mr. Pomerantz and said, 'Wait a minute. Those are potentially compensation, so don't go selling those notes without telling somebody.'

So it's not true that these were completely secret. It is the disclosure what —

THE COURT: Uh-oh. We're frozen. We're frozen. Can anyone hear me?

(Off the record from 2:47 to 2:52 p.m.)

THE COURT: Okay, is everyone back on, Mr. Morris, Mr. Rukavina?

MR. RUKAVINA: Yes, Your Honor. It's —

MR. MORRIS: Yes, Your Honor.

MR. RUKAVINA: We all — we all can hear each other perfectly. Sometimes the Court, we can't hear you perfectly. So I suggest that the problem is on the Court's end.

THE COURT: Okay, okay. We've got the IT guy coming back up here. I'm going to have him just sit through the rest of this, but for now, Ms. Perez, you can continue.

Just a minute.

Harold, can you stay, because they're saying it's at our end because when we freeze, they can all hear each other but not us.

Okay, so we got an IT guy.

Ms. Perez, you can continue. Let's see, where were you.

MS. DEITSCH-PEREZ: I think actually we — we were talking about the fact that the agreement wasn't really secret, that there had been some heads-up to Mr. Waterhouse and from Judge Lynn to Jeff Pomerantz. And, in fact, you had asked what — where was the testimony about telling Mr. Waterhouse.

And, Mike, if you go to slide 18, I think we quote — we quote at least Jim's there. So there was a little bit of it there. And we can also get you the Waterhouse page and line numbers also.

So I'm going to jump ahead because in the course of answering your questions, I did cover some of this, so we can go past 18. And then 19, this is the letter from — that I just talked about. And let's go on to 20.

THE COURT: Okay. I'm not seeing the slides, so the same thing —

MS. DEITSCH-PEREZ: You're not seeing the slides?

THE COURT: — same thing happened earlier today when we had to reconnect.

MS. DEITSCH-PEREZ: Mike, would you stop sharing and then reshare?

THE COURT: Okay, got it.

MR. AIGEN: We're okay.

MS. DEITSCH-PEREZ: Okay. And so, you know, another thing that the debtor points out is, gee, there was a time period when a little bit of MGM stock was sold and Mr. Dondero did not immediately jump up and down and say, 'Okay, you better forgive my loans,' and therefore the fact that he didn't do that must mean there was no agreement, there were no agreements. No, all it meant was that Mr. Dondero was trying to maximize the prospects for reorganization. And, as Mr. Morris is found of saying, no good deed goes unpunished because now it's being raised as a defense or a counter to — to the defendants' defense.

So if we go on to slide 21, again there's some fuss about whether Nancy looked at the notes at the time she was entering into the agreement. You know, that's the kind of thing that maybe Mr. Morris could fool a jury that that's meaningful. But that would actually be a good reason for a motion in limine, not summary judgment to — to knock it out.

The same thing about the focus on the fact that it's a

verbal agreement. I mean maybe that ought to be limined out of a jury trial or at least the amount of argument on it limited because lawyers tend to play on the prejudices of nonlawyers that contracts must be in writing or that certain formalities, like showing her the notes, must be met when they're not requirements at all.

So let's go on to slide 22.

Again here are some extrinsic evidence that tends to support the notion that there was an agreement. The debtor says, well, there's no history of forgiving loans as compensation, but in fact that's not true. Mr. Seery admitted that they had found some. Now it wasn't widespread, it wasn't all the time, but there is evidence that other executives had loan — had regular straight-up, bonafide loans that were subsequently made forgivable based on — based on how they did. And here is a little bit of the testimony of Mr. Dondero battered (phonetic) and in his deposition. There's more.

So not only plaintiff is wrong that there was no prior practice, even if there wasn't one, that wouldn't be summary judgment evidence that this agreement didn't take place, but the fact that there were other people who got such agreements is evidence, so again summary judgment. It supports the existence — it supports the existence of an agreement.

And this also takes us back to what I was talking to you about earlier that doesn't it seem more likely to you than

not that Mr. Dondero would — would take the advice of someone like Professor McGovern (phonetic) on how to have compensation that was tax efficient, which is you borrow some money and then you could either later take more money as part of your compensation or you make the loan forgivable if you succeeded in something. And the latter is tax efficient. Taking, just taking the money is not tax efficient. Is there anyone here who would doubt that Mr. Dondero would take the tax-efficient way?

Let's go to the next slide.

MR. RUKAVINA: Hey, Ms. Deitsch-Perez, I must interrupt you, —

MS. DEITSCH-PEREZ: Yeah.

MR. RUKAVINA: —, please. I need to take over. And if I have any time left over, I will yield it, but you've had 70 minutes by my clock.

MS. DEITSCH-PEREZ: I do apologize and part of that was in answering questions. If you give me just one minute, I will look to see if there is anything that absolutely must be said and then —

MR. RUKAVINA: Thank you.

MS. DEITSCH-PEREZ: — I will yield the field.

Yeah, I do want to go quickly to slide 27, okay. Maybe it's 28. Okay.

There was confusion in Mr. Morris' argument about consideration. We are not arguing that the sole consideration

was that Mr. Dondero work harder. He could have and would have taken more compensation, which he was entitled to do, because if you look back at the LPA, even — you know, he could have taken $5 million a year or even more if there was no NAM (phonetic) trigger, and the debtor does claim there was a NAM trigger period. He could have taken much more compensation if he had not gotten this agreement, so there is no lack-of-consideration argument.

And I will — I would urge you, we'll send you these slides, just look at what we have to say about competence. There is no serious argument that Nancy was not competent to enter into an agreement. Lack of competence means something like you were drunk or you were mentally ill or otherwise incapable of entering into the agreement.

And I mean if a client tasked me with — with negotiating an agreement on — you know, that involved particle physics and to get all the components that are needed to build some equipment, and I did a crappy job at it because I knew nothing about the subject matter, no one would seriously argue that you could not enforce the contract because the party tasked with negotiating, you know, wasn't the ideal person to do it. That's not what lack of competent — competence means.

And I will now leave for Mr. Rukavina to please cover the issues with respect to Highland should have been taking care of the payments and the prepayment arguments. And if I have

more time later, I will take it. Thank you very much, Your Honor.

THE COURT: All right. Thank you.

Mr. Rukavina.

MR. RUKAVINA: Thank you, Your Honor.

I think first the Court is under the assumption that these were all notes for $70 million in the couple of years before bankruptcy. That is not correct.

So, Mr. Vasek, please pull up the NexPoint note and go to the last page.

So this is the NexPoint note, Your Honor, almost half of the amount. And you will see this is from 2014 and 2015. This is our old note.

Go to the very top, Mr. Vasek.

And at the very top it says that this note is in substitution for and supersedes the prior note. So the monies were extended in 2014 and 2015. HCMS likewise goes back to 2015. I don't have it to share right now. And HCRE goes back to 2014. I don't have that to share right now either.

You can remove that, Mr. Vasek.

But I think everyone here knows that in 2014 and 2015 Highland was doing very, very well, certainly much better than in 2019. So I just wanted to correct the Court's review that the monies were actually transferred from Highland in 2019 or so, and 2018. HCMFA, that is true, but it is not for the other

notes.

Mr. Vasek, if you will please pull up my deck.

So — so, first, Your Honor, let me address the prepayment affirmative defense, and this is an affirmative defense. And I want to focus on NexPoint, which is my client. But I think Ms. Deitsch-Perez's clients have identical issues.

So first we have to look at the language of the note. And it clearly says that the maker may prepay in whole or in part the unpaid principal — everyone knows what that means — and then it says, "or accrued interest of this note." I don't understand how one prepays accrued interest. Accrued interest means that it's already happened and you're paying it, but the note says accrued — prepay accrued interest. The Court must construe the instrument to give that meaning.

And here you see I have a quote from Mr. Seery when I asked him this at his deposition. He says: Interest accrues on this note. How you prepay it is you send the money before the accrual date.

So that makes sense. So you want to prepay future interest, basically. That's what prepaying accrued interest means.

But look at the second sentence of this provision. It says: Any payment on this note shall be applied first to unpaid accrued interest and then to unpaid principal hereof. So we have here immediately an ambiguity. So I'm allowed to prepay

future interest, but the second sentence says that any payment first goes to accrued interest, meaning present, historical interest, and into unpaid principal. So how can a prepayment ever go towards future interest? So again we submit that there is an ambiguity in this provision.

Go to the next slide.

But clearly what my client had done before, was it did prepay future interest. This is the actual course of conduct between the parties. This is the ledger that is in the debtor's appendix. I can certainly give you the citation. And we — Ms. Hendrix at her deposition walked us through it. So this is NexPoint right now.

So you see on the left there is a column that says, "Interest accrual," that's how much interest is accrued at any given point in time. "Interest paid" and "Accrued interest." So I want to take Your Honor to near the bottom, May 9th, 2018. On May 9th, 2018, NexPoint made a $879,000 and change payment. And look at how the debtor applied that. Even though there was only $39,000 of accrued interest pending, the balance did not go to the principal. The balance went to future interest. You see that there is a negative entry of $835,000 interest. And then as time goes on, — I don't have the rest of it right now, I can certainly pull it up — as time goes on, if Your Honor looks at this, you will see that basically the prepayment of that future interest basically took care of many months of future interest.

This also happened on December 5th, 2017, when there was a prepayment of future interest of $127,000, and on December 18th, when there was a prepayment of future interest of $60,000 and more. So — and obviously we know that the Court can look at the parties' course of conduct whether the contract is ambiguous or not. The contract does have to be ambiguous for the Court to look at the course of conduct to understand how the parties understood and applied this change.

Again, all this is more fully set forth in our brief. And if the Court needs me to pull up the full payment ledger, I certainly can. But the only point of this exercise is to show you that the debtor and NexPoint historically understood the note to allow the prepayment of future interest, not just principal and not just accrued interest.

Next slide, please.

So what we have is between March and August of 2019, NexPoint made $6.38 million on its note, and the other defendants — again, what I'm saying, Your Honor, goes for the other defendants. I'm using NexPoint because, well, it's my client and it's — one example is better than more [sic].

But that $6.38 million were not due. Rather, after using it, a portion of that to pay for future interest and principal, a credit, if you will — I'm going to call it a credit — of $4.1 million remained. Now when — when NexPoint was making these payments in 2019, Mr. Dondero very clearly testified that

these were intended to be prepayments. So as happened, and as you will see, Ms. Hendrix confirms, as did everyone else, as what happened, as Highland needed liquidity, as Highland needed cash, some of these term defendants would prepay. Mr. Waterhouse would call Mr. Dondero and say, 'We need cash,' and Mr. Dondero would say, 'Okay, how much,' and then it would be and it should have been recorded as a prepayment. So Mr. Dondero clearly talks about how when NexPoint made these payments, and this is in his declaration, Your Honor, and it's in his deposition, he expected that these were prepayments.

Next slide, please.

Now the Court may not necessarily believe that Mr. Dondero is the most credible person. I would disagree with that. And of course we're not here today on credibility determinations. But this is Ms. Hendrix. Ms. Hendrix is still with the debtor. She was at that time the debtor's senior accountant and she is now the debtor's controller. She certainly is going to be credible and she certainly has no reason to try to wriggle out of any promissory note.

So I ask her does she have any understanding as to why in 2019 NexPoint was making these large payments. And he she goes on to testify that, without looking at all the emails, Highland would have needed cash, so this was one way to get the cash to the debtor.

I ask, "So this is kind of like what we discussed in

the beginning, that Mr. Dondero on a cash-needed basis would just transfer money between entities?

"Yes.

"Do you have any memory in the first half of 2019 whether Highland had any particular need for cash money?"

She says, "We always had a need."

Then I ask her, "If NexPoint — if NexPoint was transferring money back to Highland on this note, because Highland needed the money, wouldn't those have been recorded as prepayments by the debtor?"

Mr. Morris objects to form. "You can discuss that."

But she says, "Yes." So she confirms that if NexPoint was making large unscheduled payments on its promissory note, they would have been recorded as prepayments.

Now why is that important?

Next slide, please.

So recall, Your Honor, that at the end of 2019, NexPoint, there was what I call a credit of $4.1 million. NexPoint had prepaid $4.1 million. Our argument is that that was enough to prepay all of the accrued and unpaid interest and principal due in the year 2020. So recall the issue is that NexPoint did not make the 2020 payment on or before December 31, as the debtor alleges is required.

NexPoint did make payments. And NexPoint had an unallocated, unapplied $4.1 million — again what I call —

credit, which Mr. Dondero and Ms. Hendrix both state should have been a prepayment. Very importantly, these notes do not have language that say that a prepayment does not relieve the maker of any scheduled payments. Most notes that we have, that we have seen, at least in bankruptcy, where there is the ability to prepay, the note also says that making a prepayment does not relieve you of scheduled payments.

So we believe that it is equitable, appropriate, and fair, in compliance with Texas law, and the intent of the parties that those 2019 overpayments, credits, prepayments are left there for future application against future obligations. We know that all reasonable inferences must be drawn in the nonmovant's favor. And we know from Texas case law, we quote this and we discuss this, that when neither party clearly applies a prepayment against an obligation, so Mr. Dondero knew that there were prepayments, but he did not say those better relieve me of my December 31, 2020 payment, and Ms. Hendrix knew that they were prepayments, but she didn't say those are going to or those are not going to relieve your debt. So when we have something like this, where neither party clearly applies the prepayment to any obligation, then it is up to the law and the equities of the case to make a proper application of that payment.

And, importantly, under Texas law, Texas Supreme Court law, that such a presumed legal equitable application should be

done in the manner that would be most beneficial to the debtor. So it's just logic. It's not — there's nothing magical about it. My client overpaid by $4.1 million in 2019. That was intended to be a prepayment. The debtor asked for that money because the debtor needed that money. The debtor got the benefit of that money. And the most logical, best, most equitable way to apply that is against the next scheduled payments. That's what happened before. There is no language that says you have to make scheduled payments.

Now we believe there are no real disputes of fact on anything I've just shown you. Yes, perhaps the trier of fact can apply the prepayments differently. The trier of fact can say, 'Well, we're going to apply them to principal.' But the law clearly allows the trier of fact to decide, based on the equities, where the prepayments should be applied. And because that is a question of fact, Your Honor, it is outside the scope of summary judgment. The Court should, therefore, deny summary judgment on the prepayment defense, allow these facts to be presented to a jury. And the jury, based on all the facts that it hears, will decide whether the default Texas law that the payments should be applied as most beneficial to NexPoint should be followed or, for some other reason, it shouldn't.

Next slide, please.

The next defense, which is probably an affirmative defense, concerns the fact that we contracted with Highland to

monitor and take care of our payables for us. So you heard Mr. Morris talk about the shared services agreement. You heard him talk about Section 2. I heard him say something that I don't — I don't know if I heard him right, which he said something like 'We're just pulling this out of thin air,' but the NexPoint shared services agreement clearly says that NexPoint shall provide assistance and advice, not just assistance, Your Honor, but advice, with respect to back-office and middle-office functions, which clearly contemplates payables, and then it says, "including but not limited to payments, accounts payables," and other things, like cash management, finance, bookkeeping.

Then it says, "assistance and advice on all things ancillary or incidental," incidental "to the foregoing." And then it also says "other assistance and advice relating to such other back- and middle-office services in connection with the day-to-day businesses," et cetera.

So NexPoint — and, again, Ms. — Ms. Deitsch-Perez might talk about a couple of the other ones that didn't have written service agreements, but NexPoint had a written service agreement where we contracted with the debtor to monitor and take care of and advise us with our payment responsibilities — next slide — that's black and white in the contract, Your Honor.

But we asked Mr. Waterhouse whether these services would have included making sure that NexPoint would pay under

long-term obligation notes. I asked, "Was it reasonable for NexPoint to expect debtor employees to ensure that NexPoint timely paid its obligations?" There's a couple of objections to form.

But Mr. Waterhouse says, "Yes, we did that. We did that generally. Again, I don't remember specifically. But, generally, yes, you know, we did that."

And then I says, "Roles — what role in years prior to 2020 would employees of the debtor have had with respect to NexPoint making that annual payment?"

Now he answers without objection, "We would. Since we provided treasury services to the advisors, we would inform" — blah-blah-blah — "we informed Mr. Dondero of any cash obligations that are forthcoming. We do cash projections. But, yes, it is to inform Mr. Dondero of the obligations of the advisors in terms of cash and obligations that are — are upcoming and that are — are scheduled to be paid."

Next slide.

Then I ask and, again without objection, he answers. "I asked prior to the 2020 would those services have included NexPoint's payments on the $30 million loan?" He says, "Yes."

And then I ask, "And based on your experience, would it have been reasonable for NexPoint to rely on the debtor's employees to inform NexPoint of an upcoming payment due on the $30 million promissory note." That's the December 31, 2020

payment.

Again there's a couple form objections that I don't understand the basis for it. This is the debtor's CFO. This is my treasurer. This is a man that worked in shared services certainly knew what would have been reasonable, and he says, "Yes. Yes, they did." But then of course he adds, "Those notes weren't a secret to anyone."

Let me also correct something that Mr. Morris mentioned. Mr. Morris said at that no one Social Security any provision that Highland is supposed to pay these notes. It's a play on words, Your Honor. Of course Highland doesn't pay on our notes. As the summary judgment record shows, as Mr. Waterhouse, as Mr. Klos, as Ms. Hendrix all testified, it's in their depositions, it's in my brief, Highland would pay advisor bills from advisor funds. Highland had access and control over advisor accounts and Highland would make those payments.

Mr. Morris also referenced those emails where Ms. Hendrix would ask Mr. Waterhouse for approval to make payables. That's exactly what happened. That happened on at least a weekly basis. But Mr. Waterhouse was wearing his CFO of Highland hat when the a happened. Ms. Hendrix was not an advisor employee. Ms. Hendrix, pursuant to shared services, was asking Mr. Waterhouse, pursuant to shared services, whether the following bills and obligations of the advisor should be paid. So let's be clear on that. we are not arguing that

somehow Highland had to use its money to pay our obligation, not at all. Just that Highland had to assist and advise us.

Next slide, please.

Now we come to the question of fact. The underlying — well, I apologize. Who is it — Julian, I see, viewing "Julian Vasek" right over my title. What is this? Who is testifying right here?

THE COURT: Hendrix.

MR. RUKAVINA: Is this — is this Hendrix? Hendrix. Thank you.

MS. DEITSCH-PEREZ: Hendrix.

MR. RUKAVINA: And I apologize, Your Honor. I just — I don't know why I can't read it.

Just to round out the discussion, not only — if the Court questions Mr. Waterhouse's sincerity, again, you can't question Ms. Hendrix's sincerity.

Ms. Hendrix, again I ask her there at the bottom, "As part of that in December 2020, would it have been employees of the debtor that would have scheduled potential payment subject to approval by NexPoint, NexPoint's future obligations as they were coming due, she says, "Yes, only with approval."

And then I ask, "And would that have included NexPoint's obligations on the promissory note to Highland." And she says, "Yes," again without objection.

So we're on the next slide.

And Mr. Dondero confirms the same, but you can go to the next slide. So we have again Mr. Dondero, Mr. Waterhouse, and Ms. Hendrix all discussing how the advisors would rely on Highland to schedule and advise with these payments, and how that was one of the services contracted out to Highland.

Now here is the dispute of fact, one that the Court obviously cannot resolve. In late November or early December 2020, Mr. Dondero learns of alleged overpayments under shared services, and he tells Mr. Waterhouse stop payments. Mr. Dondero said, testified, he said stop payments just on shared services and payroll reimbursement. Mr. Waterhouse testifies, no, no, Mr. Waterhouse said — Mr. Dondero said stop all payments.

So if the jury believes Mr. Dondero, that he did not say stop payments on the notes, then Highland's fault is obvious. Likewise, if the jury believed Mr. Waterhouse, then Highland's fault is still obvious because, as Mr. Waterhouse confirmed, after he got that instruction from Dondero, he did nothing. He did nothing. He literally put his head in the sand and did nothing.

Well, I'm sorry, but the CFO and treasurer, someone who that is contracted out to provide these services, needed to take some action, such as ensure if he understood Mr. Dondero correctly, try to advise Mr. Dondero of the consequences, and try to convince Mr. Dondero otherwise. Would Mr. Dondero and

NexPoint really for a million dollars, especially because it had been prepaid, wanted to default on what was at that time — I forget how much — a 23,-, $24 million note? Of c- — Your Honor mentioned it this morning. When the Court denied our Rule 16 motion to extend the expert deadline for Pully, the Court found that expert testimony was not needed to decide this standard of care. A reasonable jury can conclude that Highland was at fault, whether it's Waterhouse's or Dondero's testimony. And here is why.

Next slide, please.

The shared services agreement, Your Honor, there it is in the middle, standard of care, it expressly provides that Highland will fulfill its duties with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in like capacity, et cetera, et cetera, we discussed this at the Rule 16 hearing.

So we know that the Court cannot — first of all, we know that there is language in the shared services agreements requiring Highland to assist and advise NexPoint with its payment obligations. We know that Dondero, Waterhouse, and Hendrix all testified that that included ensuring that NexPoint was advised of its upcoming note payment.

We don't know whether Dondero or Waterhouse, which one the jury will before, we can't — the can't decide that. And the Court also can't decide whether this black-and-white standard of

care was satisfied. But the Court did rule that that does not require expert testimony, that that is within the average juror's ability to decide. And although I am seeking a reconsideration of that order, I don't have that reconsideration, so right now this Court's order stands that I do not need expert testimony to prove up that that standard of care was violated.

And we know from the United States Supreme Court that on summary judgment the Court cannot decide whether a standard of care was violated or not. But, again, there is a standard of care and there is a service contracted for.

Next slide, please.

And that means that under Texas law, Your Honor, that one whose negligence caused a delay in performance of a contract, that delay is excused. We have cited case after can for that proposition. I'm not going to read them to you, but it's also common sense.

If I contract with someone to do something for me and they mess up, they fail, they can't then take advantage of my resulting delay, when I have been paying them and relying on them to make sure that I do it right. That, Your Honor, is the Highland fault affirmative defense.

Next slide.

And, again, that defense is factually intensive. There are disputed facts, but it is a valid defense under Texas

law.

The final one, and I will be very brief on this, Your Honor, the record is clear, a couple of weeks after the default, the defendants, NexPoint, we actually made the payments. What happened was Dondero called Waterhouse, Waterhouse said, 'Well, you didn't make the payments.' Dondero said, 'Make the payments.' So now we have — we have questions of fact.

Mr. Dondero has given sworn testimony that when he made those payments, it was his understanding that they would cure the prior defaults. Now at this time Mr. Waterhouse was still the CFO of the debtor. He certainly had the ability to speak at least with apparent authority for the debtor. At this time — so go to the next slide, please — at this time Mr. Waterhouse did not advise Mr. Dondero that the payments would not cure.

Now in truth and in fairness, Mr. Waterhouse — no one remembers whether Mr. Waterhouse said the payments will cure. I don't have any evidence of that. I'm not arguing that Mr. Waterhouse told Dondero, 'Make these payments and your defaults are cured and the notes unaccelerated.' The point is, going back to the standard of care, Your Honor, under shared services, Mr. Waterhouse did not advise Mr. Dondero that making these payments will not or might not or Mr. Seery might decide not cure your defaults. That is exactly what the CFO and treasurer, a Highland employee, under contract to provide us with advice

regarding our payments should have said. That is an omission by him. So he basically induced Mr. Dondero to have these payments made. Mr. Dondero believed that they would cure the — the defaults. And Highland kept the money. That's again common sense.

Would Mr. Dondero have really said, 'Make millions of dollars of payments,' after we had been defaulted and accelerated if he did not believe that it would not cure and unaccelerate the notes? But that is a question of fact. Whether Mr. Dondero's expectation was reasonable is a question of fact. Whether Mr. Dondero is telling the truth is a question of fact. Whether Mr. Waterhouse is telling the truth, it's a question of fact. And that's all that matters for purposes of summary judgment.

Is that the last slide, Julian?

So those — that rounds off, Your Honor, our discussion — you can close this, Julian — that rounds off our discussion the note, the terminal defendants. Now let's move to HCMFA. And I want to try to be brief on this one because I understand that I'm not going to permitted to argue the signature issue, which would have otherwise consumed a lot of time.

Please pull up the HCMFA one, Julian.

MR. VASEK: Just a moment.

MR. RUKAVINA: So go to the next slide, please.

So the defense here, Your Honor, is mutual mistake.

We have two promissory notes, May 2nd of $2.4 million, May 3rd of $5 million. And — and the core of the mistake is that these — these were transfers that happened from Highland to HCMFA, but that they were never intended or authorized to be loans, were instead compensation. And we're going to go through that in quite some detail.

Next slide, please.

So this is back to that time line I shared with you earlier. The bottom half now really won't matter. It related to the signature issue that has been precluded.

So we have the shared services agreement from 2013. It's a little bit different than the NexPoint one I just discussed. This is a separate HCMFA one, but we'll get to that. And in 2018, there is a valuation error regarding an asset called TerreStar. And it's all in the record. Your Honor has the post error memo, Your Honor has the memo to the SEC. There was a mistake made that caused millions of dollars in damages to one or more funds.

HCMFA contracted valuation services to Highland, pursuant to the shared services agreement. That's one of those middle-office things you've heard about. So ultimately what happened was that HCMFA, pursuant to a compromise that involved the SEC and the insurance carrier, paid just over — or just under $5.2 million as compensation to the funds. And then on May 2nd, it paid an additional just under $2.4 million. There

is a contradictory evidence, which again the Court can't resolve. Mr. Dondero, Mr. Waterhouse believed that $2.4 million to be compensation. And that's also in the post-error memo that we have that we can walk through. Whereas, Mr. Klos and Ms. Hendrix remembered that $2.4 million to be a consent fee, a fee payable to the holders of various funds to convert them from open to closed funds — or maybe I'm inverting that.

So now we have the two promissory notes, we have the two payments on account of the NAV (phonetic) error. Then Highland calls the notes. These were demand notes. Highland files the complaint. We first answer with no affirmative defenses. After filing a motion for leave, we assert the affirmative defense of mutual mistake. And, very importantly, I walked you through it this morning, I can well, you through it again, we assert in multiple places that we did not execute the notes and that Mr. Waterhouse did not have authority on behalf of NexPoint to execute the notes —

(Very brief garbled audio.)

MR. RUKAVINA: — signature. I'm not talking about the signature now. I'm talking about that NexPoint did not execute the notes and that Mr. Waterhouse wasn't authorized.

Next slide, please.

So this is — this is a new record. Mr. Dondero testified and gave an affidavit, and it's always been consistent, that he was very angry about these mistakes. They

cost a lot of money. Yes, the insurance paid for five point something, but it was very embarrassing. It caused a huge amount of internal problems. Everyone in the complex knew about this because you don't make errors like this, no. So Mr. Waterhouse — I'm sorry — Mr. Dondero said in his own mind that Highland needs to compensate HCMFA, because it HCMFA that was on the hook. So that's in the record.

Now by itself, the Court might not find that credible, although the Court can't make that determination. I'll give you other indicia of credibility. What — what both Dondero and Waterhouse testified to clearly and unambiguously is that only Mr. Dondero could authorize Highland or HCMFA to make or take loans on that size at that time. Only Mr. Dondero.

Mr. Morris talked about apparent authority because Mr. Waterhouse is the treasurer of HCMFA. Normally he'd be right, that a CFO or treasurer can go out there and presume to have authority to enter into loans of this size. That does not apply when he wears both hats. When an agent is common to two principles, the agent's knowledge is imputed to both. Both principals know what the agent knows. If the agent knows that he can't authorize this on the one, that applies on the other one as well.

And we have briefed this at length. There is no point in my hammering on that. But the fact that Mr. Waterhouse was an agent for both means he can't have no apparent authority.

Apparent authority is, again, what someone outside reasonably assumes you'd have. All that he could have was actual authority and he could not have actual authority on his own to take or make loans of this size.

So what happens, what both Dondero and Waterhouse testified to is Dondero tells Waterhouse to transfer $7.4 million from Highland to HCMFA. Dondero did not say these are loans. Dondero did not tell Waterhouse why these transfers were happening, except that they were related to TerreStar.

Waterhouse did not ask if they were loans, and he does not recall being told that they were loans. What he remembers is Dondero saying, 'Go get the money from Highland.' But, again importantly, to bolster the credibility of Mr. Dondero, not that it needs credibility, what Mr. Waterhouse remembers is that these transfers were related to the NAV error. Were. Nothing at all about a liquidity need on the part of HCMFA. No evidence, no one has said nothing in the record that, wait, HCMFA needs liquidity, so let's transfer funds to HCMFA by way of a loan.

All of them remember, Waterhouse, Klos, and Hendrix, that it was related to the NAV error. Again, the NAV error, where Highland caused this liability for HCMFA. That bolsters Mr. Dondero's subjective intent that this transfer be compensation for the harm that Highland caused.

Now as Mr. Waterhouse testified at length, these notes

should have gone through the Legal Department. They did not. Instead Waterhouse tells Mr. Klos, at that time the controller, to transfer the funds. That's all he tells him, 'Transfer the funds.' Mr. Klos, and he testified at length about this, testifies about how based on prior practice he, a prudent accountant, a prudent controller, would paper up intercompany transfers as loans or payments on loans — well, not he, but that would be the practice.

Mr. Klos doesn't ask, 'Are these loans therefore,' he assumes that they're loans because that's the prior practice. He then instructs Ms. Hendrix, the senior accountant, to go paper them up, and his role is done. Now it is true that on one of those two emails instructing that the loans — that the transfers be papered up, he does copy Mr. Waterhouse. He does. And the debtor argues, well, Mr. Waterhouse should have hit the panic button and said these are not loans. Well, that's some evidence of something. That's some evidence that perhaps Mr. Waterhouse thought that they were loans. But it's just evidence of that. It is not — it is not the magic bullet here. The point again is Mr. Klos testified very clearly that he assumed, based on prior practice, that these were loans. And then Ms. Hendrix likewise testified very clearly that based on prior practice and Mr. Klos' instructions these were loans, and she papered them up as loans. It didn't go through Legal, she papered them up as loans. She never showed the notes to Mr.

Waterhouse, she never brought the end notes to Mr. Waterhouse. That was it. Mr. Waterhouse told Klos to transfer it. Klos told Hendrix to paper it up as loans. And that was it.

Next slide, please.

Now there is a lot of other circumstantial evidence here that I think a jury should and will consider. And I agree completely with Ms. Deitsch-Perez, Mr. Morris' argument is the best evidence of why the Court cannot grant summary judgment because it kept talking about jury and reasonable jury, and he was making opening arguments. But look at the other circumstantial evidence.

There is two notes, two transfers, and two payments by HCMFA for the harm caused. If there is a need for liquidity, why have two notes and two transfers? Highland was bleeding cash at that time. Mr. Dondero — this is in the record — personally put in money into Highland so that Highland could make these transfers to HCMFA. Why would he have done that unless it was for compensation. If HCMFA needed funding for some reason, why wouldn't he have just put money into HCMFA? Why have Highland do it?

The promissory notes are in amounts very, very similar to the actual payouts because of the error, 5 million versus 5.2 million, 2.4 million versus just under that. In fact, the 2.4 million is done on the very same day as the note. Again Waterhouse remembers that this was related to the NAV error.

There is no mention by anyone in their depositions, the debtor hasn't presented any because there is none, that there was a need at HCMFA at that time to transfer money such that this would be a loan. Again, Ms. Hendrix remembers that this was related to the NAV error and the consent fee, so there is a question of fact there. The — the shared services provides for the valuation. Again, this was logical when I put in here it passes the smell test.

If Mr. Morris asking the Court to conclude that no reasonable juror could conclude that this is true, I — not only do I respectfully disagree, I utterly disagree. The Court might not find it credible. Mr. Morris might find it incredible, but all that we need to defeat summary judgment are genuine issues of dispute fact. These are all genuine issues.

No one is arguing that some space alien came down here and fabricated these promissory notes. That would not be a genuine issue. And, again, nothing went through Legal, nothing was papered up through Legal, nothing was shown to Waterhouse afterwards.

Now the big counter argument is, well, how could Mr. Waterhouse carry these on the books for months and months, how do he file MORs. This is all just a lie, Judge. This is an ex poste facto lie. Again, questions of fact. But let's look at Mr. Waterhouse's understanding after the fact.

The email, Julian. So — slow down a little bit more.

So — so Your Honor has this, we've addressed it. What is being discussed here is the retail boards are asking of the advisor, HCMFA, amongst other things, are any amounts currently payable or due to the debtor by HCMFA. What you see then from Lauren Fedtherd (phonetic), and she's copying various people whose names you've gotten to know, she talks about HCMFA, due to HCMLP of June 30th, 2022, 12 million and change, per the top.

Look at how Mr. Waterhouse responds. The man who signed these notes allegedly a little over a year earlier, he's going off memory here, he says the HCMFA note is a demand note. There was an agreement between HCMLP the earliest they could demand is May 2021. That's completely wrong. And why is it wrong? Because there are four HCMFA notes, Your Honor. There were two prior notes — we have briefed this. We have given you copies. The debtor has sued HCMFA for these two prior notes — where the maturity was extended to May 2021, which is the why the debtor only filed suit on those notes after that maturity passed.

So again here is the CFO, who Mr. Morris has told you, and the Court, I heard the Court say should have known better, calling the HCMFA note a note instead of promissory notes, and saying that the earliest it could be demanded is May 2021.

Close this and pull up the Rule 15(c), Julian.

We're going to look at just the top of this Rule 15(c), Your Honor, because it contains highly confidential,

proprietary information, but this is the report that Mr. Morris told you that HCMFA sent to the retail boards where they concede and admit that they owed this money.

Scroll down, Julian. Keep scrolling. Keep scrolling, please. Okay.

So there are any material amounts currently payable or due. So here again, now this is the whole Legal and Accounting Department at Highland, Ms. Fedtherd, Mr. Klos, Ms. Hendrix, Mr. Waterhouse. You saw them all on that email. None of them remembered, oh, wait, oh, wait, these notes have not been extended to May 2021; oh, wait, there's more than one note. Again, it talks about the note between HCMLP and HCMFA and it talks about coming due in May 2021. Again, that's not correct.

And the debtor has never explained why the numbers don't add up. Why does it say that HCMLP — I'm sorry, where is it here — the twelve million two hundred and eighty-six thousand, Your Honor. So there were the two notes are the question here for 7.4 million and there were two other notes which — it's in my brief, I forget right now, but the total amount is quite a bit higher than $12.286 million.

No one has ever tried to explain to Your Honor why these professional people, if they believe and know of the existence of four notes, can't do simple math and add up four principal amounts owing — you can close this. The point of me saying that, Your Honor, is it's very easy in hindsight for Mr.

Morris to argue and for, frankly, the Court to assume that Mr. Waterhouse and his team did know about these notes, that they were always reported in the bankruptcy and that this is just us trying to weasel out of a lawful debt after the fact. That is not correct, Your Honor. That is not correct because, as I've shown you, that's just a small sampling of our evidence.

These two notes are different. These two notes are different and they're different because the amounts are very similar to the prior HCMFA notes. These two notes are different because there were two prior HCMFA notes. Everyone knew that there were two prior HCMFA notes. Everyone would have recalled that and they would have put it in financials. They would have put it on Rule 15(c)s. They would have put it on the bankruptcy schedules. That does not mean that they knew about these two notes, that they knew that there were in fact four notes. People were confused. They were confused for many reasons because this had to do with TerreStar, it had to do with the same numbers as was paid out to TerreStar.

And the jury, a reasonable jury can conclude that all these people that are now telling you that Mr. Waterhouse should have been perfect and Ms. Hendrix should have been perfect and Mr. Klos should have been perfect and Ms. Fedtherd should have been perfect, that they made a simple mistake. And that mistake was that these promissory notes were never intended to be debt. Mr. Waterhouse didn't register them as such in his mind. And

that's why you see mistake after mistake of how they're carried.

And, finally, yes, there are repeated instances of the debt from HCMFA being recorded, but it's also all debtor employees. Of course Ms. Hendrix, who prepared the notes, assuming that they were loans, would have recorded that. Of course Mr. Klos, who told her to do that, assuming that they were loans, would have recorded that. That's evidence of nothing. That's not evidence that there was a mutual mistake. That's evidence that the people who caused the mistake did so in good faith and didn't defraud anyone.

And the final point is the debtor makes a big deal about how my client received $5.1 million from the insurance company to pay part of the liability for this error. We have briefed out in some detail the collateral source rule in Texas. That rule allows you to have a double recovery. That rules says you can recover from an insurance company and from the tortfeasor without any kind of problem. And it exists and it's existed for over a hundred years because people can go out there and pay for insurance and are responsible, not insurance pays, that should not be relieving the tortfeasor of its liability. So that's a red herring.

And, really, if Highland believes that we did something wrong with the insurance carrier, then it can go and talk to the insurance carrier.

Fact, Your Honor, there was a NAV error. Fact, it

caused my client to pay over $7.4 million in damages. Fact, there is two transfers of about that amount. Arguable fact, Mr. Dondero instructed that this be compensation. Arguable fact, Mr. Waterhouse knew about it.

Now pull up my PowerPoint, Your Honor — Julian.

My final point, Your Honor, my time is almost up. This is now the authority. This is a very important point.

Go down, please.

Okay. So — so let's talk about the authority now. We — I mentioned earlier the UCC. Here, Your Honor, I have quoted the relevant portion. It's the Texas version, 3.308(a): In an action with respect to an instrument, the authenticity and authority to make — that's clear — and authority to make each signature on the instrument are admitted unless specifically denied in the pleadings.

If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity.

I'm not talking about the Waterhouse signature, Your Honor, now. I'm talking about just the authority. In our first amended answer, as I walked you through before, we expressly denied, specifically denied that Waterhouse had the authority to make the promissory note on behalf of HCMFA. Because that's denied in the pleadings, the burden of establishing validity is on the person claiming validity, HCMFA. There is zero evidence

before Your Honor from the debtor that Mr. Waterhouse was authorized by the debtor or by HCMFA to execute these notes. Certainly Klos and Hendrix weren't. Those were lower-level employees, those were not officers. There's no argument that they were.

The burden is on Highland to prove that Waterhouse had actual and/or apparent authority to sign these notes. There is nothing in the record to prove that, Your Honor, because again the mere fact that this being an officer doesn't matter. And both Dondero and Waterhouse testified that Waterhouse did not have that authority. So for that reason, if no other reason, Your Honor, the Court cannot recommend granting summary judgment because there is a fatal flaw of evidence on the part of the debtor.

Again the debtor assumes, 'Well, he is the officer, he can do it.' Uh-uh, because he's wearing both hats. Thank you, Your Honor.

THE COURT: All right. Thank you.

All right.

MR. MORRIS: Your Honor, may I — may I request just a very brief break before I give my rebuttal, which I don't expect to last the whole 55 minutes that I have?

THE COURT: I need a break as well —

MR. RUKAVINA: May we make it 10 minutes, Your Honor?

THE COURT: We'll make it 10 minutes right.

COURT SECURITY OFFICER: All rise.

MR. MORRIS: So we'll come back at the top of the hour?

THE COURT: We'll — yeah, it's 3:48, let's just make it four o'clock we'll come back.

(Recess taken.)

COURT SECURITY OFFICER: All rise.

THE COURT: All right. Please be seated.

We are back on the record in the Highland note adversaries.

Mr. Morris, do we have you?

Looks like I'm on mute. Am I on mute?

All right. Hello. I was muted apparently. We're back on the record in the Highland note adversaries.

Mr. Morris, are you ready for your rebuttal?

MR. MORRIS: I think so.

Ms. Canty, are you all set?

MS. CANTY: I am.

MR. MORRIS: Okay. So good afternoon, Your Honor. John Morris, Pachulski, Stang, Ziehl and Jones, for Highland Capital Management, L.P. I understand I have 55 minutes for my rebuttal. I'm hopeful not to take so long.

I want to begin my rebuttal where I began with my opening argument since I guess I was accused several times of not citing to the law, so I thought I'd cite to the law again.

We're entitled to summary judgment if there is no genuine dispute of a material fact. A dispute about a material fact is genuine only if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. And that's why I referred to the jury, not because I was making a closing argument, but because that is merely what the legal standard is.

We can meet our burden by demonstrating either an absence of evidence to support the nonmoving party's claims, or in this case defenses, or by showing that there is an absence of genuine issues of material fact.

The defendants here have to do more than create some metaphysical doubt as to material facts. They can't satisfy their burden by relying on conclusory allegations, unsubstantiated assertions, or a scintilla of evidence. Critical — where critical evidence is so weak or tenuous on an essential fact that it couldn't support a judgment in favor of the nonmovants or where it is so overwhelming that it mandates judgment in favor of the movant, summary judgment is appropriate. We believe that we easily meet that standard, notwithstanding all the moles that I'm going to try and whack now, as this is what I do for a living now. I whack moles. So I'm just going to begin with some of the assertions that were made by the first lawyer who spoke.

So it's not in any particular order because it's kind

of hard to do that on a 10-minute break. But you know they make the assertion again that there was a practice of forgiving loans. Your Honor, it's actually not a material point. I don't believe that whether or not it was a practice is material to this analysis, but they put it into their answer, and that is why we have pursued it.

I think the documentary evidence speaks for itself. Mr. Dondero as well as somebody else, I forget, testified that if a loan was forgiven, it should be recorded in the financial statements. We have put forth I think the 10 or 11 years of financial statements that existed prior to the bankruptcy filing, and what they show is that no loan was forgiven for at least seven or eight years. We're not saying that no loan was ever forgiven in the history of the world, but what we're saying is when you don't do something for seven or eight years, kind of hard to call it a practice.

And what makes it even more interesting, Your Honor, not to spend too much time on a point that I don't even think is material, but I just — I've got to whack the mole, no loan was ever forgiven for Mr. Dondero than $500,000.

And I'd like to put up on the screen, Ms. Canty, I think Exhibit 24, because it's important, because this is where credibility starts to come in.

And I'm not talking about the credibility of the witnesses, I'm talking about the credibility of the lawyers.

Because in their reply they said Highland conceded that Mr. Dondero had a loan forgiven. And they reach that conclusion because we carefully wrote in our moving papers that Mr. Johnson, Mr. Dondero's expert, testified that he was not aware of any loan prior to 2008, because we only put the financial statements up to 2008, we didn't put any earlier statements, so when we write, there's no evidence that Mr. Dondero received a forgivable loan prior to 2008, we're just trying to be careful and show what the evidence is. And they turn that around and they say, see, Highland has conceded that Mr. Dondero received a forgivable loan prior to 2008.

Let's see what Mr. Dondero said in response to these interrogatories. If we could go — keep going, because I think this is — this is so important. It goes to the credibility of the presentation here. This is called whack a mole. So keep going. Cross my fingers and hope it's 24. Keep going. It's 24 — I'm sorry. It's Request for Admission Number 15. It's page 11. Keep going. No, it's right there.

So they say Highland conceded that Mr. Dondero received a forgivable loan. It's interesting, when we asked Mr. Dondero to admit that Highland never gave him a loan that was actually forgiven, he admitted it.

We asked him did Highland ever give — to admit that Highland never gave Mr. Okada a loan that was ever forgiven, he admitted it. We asked him "to admit that Highland never gave a

loan to any entity, directly or indirectly, owned or controlled by you that was actually forgiven," he admitted it.

Okay. So those are the undisputed facts, to the extent the Court is at all interested about the so-called practice, Your Honor can decide whether or not it constitutes a practice. The facts are the facts. The facts are no loan was ever given to Mr. Dondero that was forgiven. The fact is that no loan was ever given to one of his entities that was ever forgiven. The fact is that no loan was ever given to anybody that was ever forgiven since probably 2010.

Nancy Dondero's competence, I really didn't want to address the issue because I thought we had — you can take that down — we had covered it pretty extensively in our briefing, and I had no interest in embarrassing Ms. Dondero, but I hope and assume that Your Honor has read the transcript. I'm not talking — Highland is not saying that she was drunk. Highland is not saying that she is not mentally capable of living, right. We're not using Competency with a big C, we're using competency as a small c because they're going to have to put her in front of a jury. And, again, the standard is, is there any way a reasonable jury is really going to buy the story?

The evidence speaks for itself, her testimony speaks for itself. I may be a mediocre litigator, but of this somebody asked me to create a tax structure for the maximization or the minimization of taxes, I would not be competent to do that. I

may be a mediocre litigator, but I wouldn't be competent to do that.

I don't believe, based on the testimony, again not a credibility finding, based on facts, on the facts that she asked no questions, on the fact that she didn't negotiate, on the fact that she never saw the notes, on the fact that she couldn't identify the makers of the notes, on the fact that she asked no questions about the very terms of the agreement. The agreement was he would get the bonus if the assets were above cost. She asked no questions.

Had she asked questions she would have learned they're already in the money, substantially above. That's what we mean by competence. and it's just something that the Court should consider as to whether or not a reasonable jury could ever credit that testimony.

You know, Ms. Deitsch-Perez spent a lot of time telling Your Honor how benevolent Mr. Dondero is. Absolutely no evidence in the record to support that. She spent a lot of time telling you how much he could have taken in compensation but he didn't because — he took $70 million in the three years before the bankruptcy. He took it in the form of a loan, but he took $70 million and he doesn't want to pay it back. That is the undisputed fact. He took it and the entities that he owns and controls took it. They took the money and they don't want to give it back.

And the only reason he took it in the form of a loan, — she said it — tax maximization, because he didn't want to pay income taxes on it. He took the money and he thought he would never have to pay it back, because that's Jim Dondero. Not a benevolent man. He took $70 million.

I went through that whole slide where I said there were seven or eight opportunities for him to act in his own self-interest, and the only rebuttal I got was: Mr. Dondero put the company ahead of his own self-interest. It actually would have been in the company's interest as well as his own if he had disclosed the agreements to anybody when they were entered into. If he had disclosed them to the auditors, if he had disclosed them to this Court, if he had disclosed them to the creditors, if he had disclosed them at confirmation, if he had disclosed them in response to the projections, if he had disclosed them in response to the demand letters. His failure to do that isn't some magnanimous act of — of, you know, benevolence, acting out of self-interest. That was literally the rebuttal, that it was a sacrifice and he — he — that he didn't disclose it. I don't get it. No reasonable jury, right, you're going to put this to a jury? Didn't act in his own interest and didn't act in Highland's interest.

Highland's creditors would have been much better off if Mr. Dondero had actually disclosed, if he was compliant, if he was a compliant officer, if he was part of a compliant

company, he wouldn't have allowed monthly operating reports to be filed that, according to him, falsely claimed that Highland actually had notes of the value that they were disclosed at.

The sausage-making. Undisputed facts. Undisputed facts how it developed. Yes, I agree with Ms. Deitsch-Perez, everybody overlooks things. I do. It's why we didn't produce that — that thing, because nobody followed up and we didn't think about it and you do a million things, and those things do happen, but how can you possibly explain that you sat down to create a list of people who have knowledge and information about this case and you come up with 15 people and you forget your sister who is the principal witness in the case? How do you respond to an interrogatory that says, "Please identify all the people who have knowledge about the alleged agreement," and you forget your sister? That's not an oversight.

I think the two excuses that we got were they were too busy doing things and there were too many cooks in the room. Does a jury really need to consider that? Okay, take it — take the totality, take this in totality.

You asked Ms. Deitsch-Perez, and I — just to go back to the law, you're right, what I did, Your Honor, is because I'm confident that the Court is very familiar with the standards for summary judgment, I highlighted the standards because I think it's important to put in context the argument that we're making here today, what I didn't do is go through cases because there's

no case like this, and Ms. Deitsch-Perez effectively not only agreed with that, but you asked her a much broader question, are you aware of any case where a court allowed a maker to rely on an oral agreement to get out of from under an unambiguous promissory note, and she bobbed and she weaved, but I didn't hear an answer, Your Honor. Maybe you did, I did not hear an answer.

Certainly no case that I'm aware of where parties to an oral agreement are siblings, where they've got just the mountain evidence, right, that's — that's part of what the Fifth Circuit says look to, is there a mountain of evidence. The mountain of evidence that no agreement exists is just absolutely overwhelming. There is not one scintilla of evidence, frankly, other than the words out of Jim and Nancy's mouth that supports this theory.

I want to talk for a second about — about PWC. The assertion was made again to minimize the undisputed fact. The undisputed fact is that Mr. Dondero did not disclose the agreement to PWC. The undisputed fact is that paragraph 36 of the representations required Mr. Dondero to disclose whether material or not as decided by PWC that the agreements existed because they were related-party agreements. And what Your Honor was told was, ah, maybe it's a bad judgment call not to disclose it. Maybe in hindsight, he should have done it.

He's a CPA. These are management representation

letters. The representation was unambiguous. Mr. Dondero breached his representation and the audited financial statements are false and misleading as a result, okay. It's not a question of bad judgment. What it goes to is it shows no agreement existed because if an agreement existed, it wouldn't have been good judgment to tell PWC. It would have been required. And a compliant executive and a compliant company would have disclosed it to their auditors.

The Jim and Nancy show on — on this agreement, again not a scintilla of evidence other than what that case said, self-serving conclusory allegations. You know, the fact of the matter is Jim Dondero couldn't identify the notes if he tried.

And I do want to take this opportunity, Your Honor, we haven't discussed this, maybe I should wait for this, but Exhibit 3C, I've — I've got a few objections to their exhibits, just three actually, and then one proposal. But one of them goes to this list of the promissory notes. And if Your Honor read Mr. Dondero's testimony from his deposition, he couldn't identify the notes that were subject to the agreement without this cheat sheet, which is Defendants' Exhibit 3C, and it was prepared by lawyers for litigation. And it should absolutely not be admitted into evidence.

He couldn't identify the notes that were the subject of the — of the alleged agreements. And this is critical, because it is an absolute critical term of the agreement, to

identify what notes do they apply to. And the reason that it's critical, Your Honor, is because there were a whole host of other notes that aren't part of this litigation. We know there were two other HCMFA notes, because we're suing on them. And we know that there were other notes of Jim Dondero that he paid off in the interim, right. And that's why they're not part of this litigation, but the evidence is well in the record.

And so it's not a situation where you could say, look, we had 10 notes, you sued on 10 notes, so of course the 10 notes are the subject of the litigation and it's the subject of the agreements, because those are the only notes. You can't do that here. There's lots of other notes. So if he can't specifically identify, because they didn't write it down, it's all undisputed facts, didn't write anything down, didn't create a list of notes, nothing. I think he's missing a critical term in the agreement and I think that's another reason why this thing shouldn't — you shouldn't burden a jury with this fraud — with this story.

Again, nothing corroborates their story. Ms. Deitsch-Perez referred to her experts. Respectfully, the tax law expert is irrelevant. I would stipulate you don't pay taxes until you have income. That's what he says. It's not — it's not terribly sophisticated, it's not at all — contested at all, frankly.

The important one is Mr. Johnson, and why is Mr.

Johnson so very critical to this case? Because it blows everything Ms. Deitsch-Perez said away. And how does it do that? Because by Mr. Johnson's calculation going back seven years, Mr. Dondero was only under — only under compensated, taking his analysis in full, by $20 million. It was by $1.7 million for the three years prior to the petition date, but he went back seven years, and it's in the record. I asked him how did you come up with seven years, is that subjective. Yes. Could have been five years, then the number would have been smaller. Could have been 10 years, then the number could have been bigger.

But just take his analysis at face value. There is no rhyme or reason why he picked seven years, but take seven years. Mr. Dondero was under compensated by $20 million. Why is he entering into agreements for $70 million? Benevolent? I don't think so. He helps our case. And the fact is the evidence is undisputed. If you look at Mr. Johnson's deposition, Mr. Dondero failed to disclose to Mr. Johnson tens of millions of dollars that he got in additional deferred compensation. No dispute about it.

So if you took Mr. Johnson's $20 million and you took into account the compensation that Mr. Dondero failed to share with his expert, that number comes closer to 10,-, maybe even less. Over seven years, based on Mr. Johnson's analysis, that's what he was under compensated for.

This may be my favorite of all. They attempt to dispute our assertion that Mr. — that, you know, there was never any disclosure of the agreement, and they point to two examples. I'm just going to read for a moment, Your Honor, it's page 11 from our reply brief that was filed in Adversary Proceeding 21-03003, at Docket 159, and we address this very briefly. With two irrelevant exceptions, defendants do not dispute that neither Mr. Dondero nor his sister ever told anybody about the existence or terms of the alleged agreements. And I have a citation here: Compare our motion at paragraph 28 with the opposition at a couple of places.

And I'm going to address now the two exceptions that Ms. Deitsch-Perez focused on. The two exceptions are irrelevant because they are vague, self-serving statements insufficient to create a genuine dispute of material fact. The first one I cite to is Mike Lynn's (phonetic) letter that she referred to. We also object to that exhibit only to the extent that it's being offered for the truth of the matter asserted. But with that, we would encourage the Court to read that letter. That's a letter that was sent after we commenced the lawsuit. It doesn't use the word — it doesn't use the word agreement, forgiveness, contingency, condition subsequent, Nancy, or Dugaboy. It merely expressed Mr. Dondero's, quote, views that the notes were compensation.

And then there's Mr. Waterhouse. Even accepting Mr.

Dondero's statements as true, Mr. Dondero's spoke to Mr. Waterhouse only in the context of settlement discussions, and he failed again to say the words agreement, forgiveness, contingency, condition subsequent, Nancy, or Dugaboy. Given Mr. Dondero's own words, his assertion that he, quote, did not discuss every detail of the agreements with Mr. Waterhouse is to be quite charitable. An extraordinary under statements. He admittedly did not discuss any detail of the alleged agreement with him, and we cite to the record there. So that can be found on page 11 of our reply brief. That is the entirety of the disclosures that they're relying upon.

Mr. Rukavina, he first addressed the issue of prepays. We don't dispute that there were prepayments. He kept citing Ms. Hendrix and Mr. Klos' admission that there were prepayments. I don't dispute that there's prepayments. The question becomes what is the agreement of the parties and what did they actually do. I mean I think at the end of the day the agreement of the parties carries it, but let's look at both, okay.

We encourage you, we urge you, Your Honor, because I can't — I can't whack, I can't do every single thing right here, but please look carefully at the language Mr. Rukavina suggested that there is an ambiguity. This is the first I've ever heard of that. The fact of the matter is the provision in the term notes couldn't be clearer: The parties could renegotiate and the — and the maker could repay. And it says very clearly: If

you prepay — may have said repay — I meant prepay — if you prepay, the parties' agreement says exactly how that is going to be treated. You prepay and then the money gets applied to outstanding, accrued but unpaid interest, and then the balance goes to principal. It's really like any other loan that I know of, but I'm not here to testify.

So think about that, Your Honor: Interest accrues every single day. The amortization schedule shows that interest is charged every single month, for whatever reason, and I don't think the Court needs to weigh why did they prepay. Who needed the money? Did Mr. Dondero do this, did somebody else do this?

Just look at the plain and unambiguous terms of the agreement, and then look at the amortization schedules. I think Mr. Klos' declaration will be particularly helpful because he rebuts everything that Mr. Rukavina tried to argue in order to attempt to create an addition — a genuine issue of disputed fact.

But I would ask Ms. Canty to put up on the screen the entirety of the NexPoint amortization schedule, because Mr. Rukavina focused on the very first point and then conveniently said, 'I don't want to go through the rest of it,' and there is a reason for that, because if you read Mr. Klos' declaration he's going to tell you that in May 2018, they did exactly what they're contending to now, right? So you can see in May 2018, they make a very large payment, and the payment is, in fact,

interest continues to accrue. That's the interest-accrual line, right?

Then if you just scroll down very slowly, please.

Okay. You will see — you will see that at the end of the year, if you add up the $149,000 plus the $84,000, you know, they paid — they paid $200,000, and it got applied to outstanding — here's a prepay of 13 days. So that at the end of the year, you get to zero.

Keep going.

So notwithstanding the fact that they've paid millions and millions of dollars during 2018, exactly what the agreement says, they apply it — except for that May 18 application, Mr. Rukavina is right to point that out, but he's wrong to ignore the rest of it. So — too fast, go back to the top — and you can see every single time, Your Honor, if you add up the 275,- that was the interest that was due on 2/28, plus the 135,-, the interest that was accrued at the end of March, if you add those two together, it will equal the 411,-. And if you add the 411,-, and then the balance is paid to principal. That's Your $750,000. Interest continues to accrue for the balance of March. And then you get to April.

I'm not going to debate about why the payment was made or what was intended. What we know is that they paid $1.3 million. What did they do? They applied that to the outstanding interest, $9,000 plus $73,000 equals $83,000, and

the balance went to principal, period, full stop. Interest continues to accrue. They continue to do the same thing. They continue to do the same thing.

I need not go through every one of these , Your Honor, but here you are, you have now in 2019, you've paid seven fifty-one three two one, so that's, what, about four four, that's about $6 million. And, lo and behold, notwithstanding the payment of all of that, right on August 13th, they make their last prepayment of the year, interest continues to accrue such that at the end of the year, on November 30th there was $412,000, on — in December there was another $113,000, so they pay the 530,-, and again there's one day of interest. I guess this is their gotcha moment. They prepaid, see they prepaid one day. They got them to the end of the year to zero. Every single time in 2019, they do exactly what the contract says, they receive a prepayment, they apply it to outstanding interest. Outstanding, accrued but unpaid. Mr. Rukavina didn't seem to understand how there could possibly be accrued but unpaid interest on prepayment because you're paying the interest that exists as of the date of the payment. It's really not complicated.

2020, made another payment, applied in exactly the same way. I don't know why he's doing this. It doesn't really matter. It's applied exactly as the unambiguous terms of the term notes provide: 412,000 plus the 113,-, right, it leaves

you with 530,-. Again, it took you to the end of the year.

And it goes on. And the same thing is true. You know, nobody's made the argument, nobody's put up the — the amortization schedule for HCMS, but the same thing is true. You know, at the end of 2019, notwithstanding the payment of all the millions of dollars, they still had to pay the interest that was due. That's the same interest that was due at the end of 2020. It's the exact same thing. The terms of the term notes are clear and unambiguous as to what happens when there is a prepayment, the parties could do something different, as Mr. Klos testified in his deposition — in his declaration, there was the one instance where they did something different, but they didn't do anything different at any other time. And all of these payments, were on the 13-week forecast. So that takes care of prepayment, I believe. The language is unambiguous and the practice was also pretty darn clear.

I heard a lot of references to equity. I don't get it. The parties' contract governs here. This is — I understand that the bankruptcy court is considered a court of equity here, but there is no equity here. The equity is making sure that Highland recovers the assets that under Jim Dondero's watch were reported to its creditors as being valid assets of the estate. That's the equitable piece that the Court should take into account if it's considered equity at all.

Let's go to the next. The next argument was the

shared services agreement. You can take that down.

You know, God bless him. He put up — he put up the shared services agreement. The shared services agreement, he focused on assistance and advice, and said it even includes accounts payable. We don't dispute, we don't dispute that Highland's accounting department effectuated payments. The one thing that Mr. Rukavina didn't do that they've never done, that they will never be able to do is show you where in the agreement Highland had not just the authority but the actual obligation to make these payments. It doesn't say it. And I think that is the end of the inquiry. I believe that the Court can rule as a matter of law that this —

(Voices on audio.)

THE COURT: Who was that?

THE REPORTER: That's someone calling in, Judge.

THE COURT: You don't know who the caller —

MS. DEITSCH-PEREZ: Somebody is unmuted and there's noise in the background.

THE COURT: Okay.

THE REPORTER: It's a number, I've muted them.

THE COURT: It's a — we've muted them. It's a number, we don't know who that was.

All right. Go ahead, Mr. Morris. I'm sorry.

MR. MORRIS: So — so you can rule as a matter of law, Your Honor, I believe very quickly and very easily that there is

no obligation, right, that Highland wasn't authorized, let alone obligated to make these payments on behalf of third parties.

To the extent the Court needs it, the — I will stipulate that Highland assisted in effectuating payments that were approved by Jim Dondero or Frank Waterhouse. Again, Exhibits 3D and 3F — 3D and 3E are a litany of December 2020 emails from Kristen Hendrix to Frank Waterhouse that says: Please, sir, do you approve these payments before I make them.

So there's no question from the documentary evidence that Kristen Hendrix always believed that she needed Frank's approval to effectuate these payments. And of course there's the 13-week forecast, so nobody — right, you've heard so much testimony about 13-week forecasts, there's no dispute that 13-week forecasts were prepared. There's no dispute. It's, you know, in our papers, it's in Mr. Klos' declaration that these forecasts fully disclosed the interest payments that were due at year-end. You know it is what it is.

You know what, can we put up Exhibit 3E, just to emphasize the point for just a moment, because Mr. Rukavina, I think, suggested, oh, you know, Mr. Waterhouse was wearing his Highland hat when he got these emails. I don't know — it's argument, right, and the Court needs to distinguish argument from facts.

Here is the fact. Here is December 31st. Jim Seery is the one who approved payments on behalf of Highland. Jim

Seery did not approve payments on behalf of the advisors or HCMFA or HCRE. That was Frank Waterhouse's responsibility. Not in his capacity as Highland's CEO, because if that was true you wouldn't need Jim Seery, right? Approved by Seery. Mr. Seery is approving everything. So final nail in that coffin.

Cure, — you can take that down now — cure, I heard argument, you know, cure that now somehow Mr. Waterhouse, who can't do anything for the advisors is somehow going to be the person to bind Highland to a cure. Again, Your Honor, I would just urge the Court to look at the four corners of the parties' agreement as reflected in the term note. There is no right to cure, right. There just isn't, period, full stop.

I think — I think the record is clear, Mr. Dondero heard on the 14th that Highland was going to seek to collect these notes, and he panicked. And he called up and he screamed at Frank Waterhouse, in the record, he said make the damn payments, and he did. Pardon my language. And he did. There's no evidence of cure. There's nothing in their answer that ever suggested that. It's not a defense.

You would have heard about that at confirmation, because these payments are made in mid-January. If he had cured this, right, remember the undisputed facts are that: We amended our projections to say we're going to collect on the term notes in 2021, because we had just commenced these lawsuits. These lawsuits were commenced on January 21st. If Mr. Dondero

actually believed at the time that Frank Waterhouse somehow bound the debtor to this cure, what better time to raise that than at confirmation. His silence, what reasonable jury is going to buy that. What reasonable jury is going to believe that he believed that he cured, and he just forgot to tell you, Your Honor, at confirmation about that. I don't think any reasonable jury will do that.

Let's be clear, let's move on to HCMFA. It's kind of cute. But, you know, the notion that Mr. Dondero authorized the transfers as — with compensation is an issue that came up for the very first time in opposition to the motion for summary judgment. If you review Mr. Dondero's transcript, if you review Mr. Waterhouse's transcript, and if you look at our motion for summary judgment which summarizes that — those facts, you will see that the undisputed evidence until we got Mr. Dondero's declaration in opposition to summary judgment, Mr. Dondero told, and this is how I started the day, Mr. Dondero told Mr. Waterhouse to make the transfer. He didn't tell it should be a loan, but he didn't tell them it should be compensation.

And, you know, don't take my word for it, Your Honor. Go back and read HCMFA's motion, their second motion for leave to amend, and look at Step 1 of Mr. Rukavina's parade of horribles, how assumptions came to be snowballed, I think he used the word. Look at Step 1. Mr. Rukavina, when he wrote back, didn't say anything about Mr. Dondero giving an

instruction to make the transfer as compensation. He simply says: Mr. Dondero didn't say to make it a loan, he said make it a transfer.

And so, again, in opposition to summary judgment, violating the cardinal rule, throwing out unsupported, uncorroborated, conclusory statements. Not permissible. He didn't have the authority, like by what? By what? Is there — is there a document that clipped his wings? Because that's not what Mr. — that's not what Mr. Waterhouse told Mr. Sauter during the interview. He didn't say, 'I don't know. I don't know where that came from. I never would have authorized that,' right? This is the changing story whack a mole that I've been dealing with for 15 months now.

You should — you should take seriously what Mr. Waterhouse told Mr. Sauter in the spring of 2021. That is probably the most credible piece of evidence that exists as to Frank Waterhouse's views on all of this. I encourage the Court to read carefully my examination of Mr. Norris, who was the 30(b)(6) witness, I believe, and then — and then the examination of Mr. Sauter at the motion, because the one thing that's crystal clear is Frank Waterhouse knew exactly what these notes were, he knew exactly when they were created, and he knew exactly why they were created. All of this stuff about the he said/she said, the rest of it, he's the person whose name appears on the notes. He's the officer. He's the fiduciary.

And, you know what, he's still there. So Frank Waterhouse, who consistently engages in the parade of horribles, that his employer alleges, right? That — I mean you're the ones who keep coming after Frank, right? Frank signed this or his signatures appear without authority. They're the ones who keep coming after Frank. And yet he's still employed. Another kind of interesting issue.

The NAV error, Your Honor, I understand that they think they're entitled to windfall, but I just want to read from Exhibit 182, which is the contemporaneous memo that the advisor sent to their client relating to the NAV error to make sure that it's clear, and you can read this. It's Exhibit 182. All about the NAV error.

"The advisor and Houlihan Lokey, an independent, third-party expert valuation consultant, approved by the board" — that would be the retail board — "initially determined that the March transaction were, quote, nonorderly, close quote, and should be given, quote, zero weight, and close quote, for purposes of determining fair value."

That's who made the determination, the advisor and Houlihan Lokey. It doesn't say anything about Highland.

"As reflected in the consultation, the advisor" — meaning HCMFA — "ultimately determined that both March transactions should be classified as orderly." So they're changing it from nonorderly to orderly. "The fair" — and then

it continues, quote: The fair valuation methodology adopted, as addressed in the consultation, weights inputs and doesn't reflect last-sales transaction pricing exclusively in determining fair value. The orderly determination, — in other words, the determination made by the advisor and adoption of the fair-weighted — the weighted fair valuation methodology resulted in NAV errors in the fund. And that's what's the fund, is the NAV error.

So this is — this is contemporaneous, documentary, undisputed evidence that the advisors told their client that it made a mistake. There is not — they talk about the letter to the SEC. They just say stuff. This is whack a mole. They didn't present a single document to you, a single contemporaneous document that says Highland made the mistake. They tell the SEC, they tell their client, they tell their insurance carrier that they made the mistake.

Undisputed facts.

I don't really have much more, Your Honor. I would just ask the Court to seriously consider the evidence, to seriously consider the legal standard, and to do justice in preparing its report and recommendations. If Your Honor has no questions, I've completed my presentation.

THE COURT: All right. Thank you.

Let me ask a couple of things. First, we don't have anything else under advisement in Highland right now. I know we

have closing arguments next week in the —

MR. MORRIS: I'm sorry. The question is whether the Court has any other matters that are under advisement right now?

THE COURT: Yeah. I don't think we do. I mean we — I mean we've done all our reports and recommendations that have been on our —

MR. MORRIS: Yeah.

THE COURT: — list. And I've got closing arguments next week one day, I forget which date, maybe Wednesday, Wednesday of next week in the —

MR. MORRIS: It is Wednesday.

THE COURT: — in the big —

MR. MORRIS: Um-hum.

THE COURT: — in the big adversary.

So — so let me think through this. Are there any — are there any looming deadlines, deadlines of any sort in these note adversary proceedings? You know, obviously you're not — you don't have a trial date out in the future in Judge Starr's court, because I'll certify when it's trial ready if it needs to go to trial. Anything, any deadlines?

MR. MORRIS: Nothing that I'm aware of, Your Honor. I think that's exactly right, that we're here finishing summary judgment, and I think the next thing to happen is for you to enter the orders on the two motions that were argued earlier today where Your Honor issued bench rulings and to get the

report and recommendation on summary judgment to Judge Starr and then we'll take it from there.

THE COURT: Okay. And —

MS. DEITSCH-PEREZ: And, Your Honor, were you asking just about the note cases? I just —

THE COURT: Well, —

MS. DEITSCH-PEREZ: These note — the note cases that are the subject of this motion or about all matters in bankruptcy —

THE COURT: I was — I was thinking of all matters. I'm just trying to think about —

MS. DEITSCH-PEREZ: There are —

THE COURT: — how quickly I'm going to get you — get a report and recommendation out. And I just, number one, wanted to know if I did have anything else in my queue ahead of this, and the answer is I don't in all of the Highland matters.

But then the second thing I was getting at was deadlines. For example, okay, if — let's say hypothetically I were to deny motion for summary judgment, then you've got a whole — you've got at that point a very complex set of adversary proceedings, right, because you've got avoidance actions and all kinds of alternative theories, plaintiff, that you would be arguing, correct?

MR. MORRIS: I think —

MS. DEITSCH-PEREZ: Those are all —

MR. MORRIS: — procedurally, Your Honor, right, you don't — I think we all agree, you don't decide this motion. You give a report and recommendation to the judge, to Judge Starr. And Judge Starr — I'll be honest with you, I don't know if we have an opportunity to object or not, but let's assume we do.

THE COURT: Well, —

MR. MORRIS: At some point Judge Starr will decide whether or not to grant the motion —

THE COURT: No, —

MR. MORRIS: — and if — and if he denies the motion, then we'll proceed to a jury trial on all claims.

THE COURT: That's what — I'm getting at the other claims. You know, it —

MS. DEITSCH-PEREZ: The other — to other claims, Your Honor, —

THE COURT: Let's — just a minute, just a minute, just a minute.

I'm just thinking through this. If summary judgment were to be denied on these Counts 1 and 2 by Judge Starr, and he said, no, this needs to go to a jury, then there are a bunch of other claims that basically —

MR. MORRIS: Correct.

THE COURT: — plaintiff — plaintiff fallback claims, right? Avoidance actions and whatnot, right?

MR. MORRIS: And breach of —

MS. DEITSCH-PEREZ: That's what —

MR. MORRIS: — fiduciary duty, that's correct, Your Honor.

MS. DEITSCH-PEREZ: Except, Your Honor, —

THE COURT: Um-hum.

MS. DEITSCH-PEREZ: — and if I could please clarify the record because Mr. Morris is incorrect that those are just sitting there, those — the motion to dismiss those claims and the motion to compel arbitration of those claims is currently sitting before Judge Starr, and he — and the parties agreed that those would be stayed until Your Honor had made the report and recommendation, and Judge Starr had ruled upon it.

THE COURT: Okay.

MS. DEITSCH-PEREZ: So that's other claims are not simply sitting in the bankruptcy court, if you want to think of them as placed somewhere. They are currently up at the district court.

THE COURT: No, I didn't think they were at the bankruptcy court. I just couldn't remember —

MS. DEITSCH-PEREZ: Okay.

THE COURT: I guess what I'm getting at, you know, have you all held up on doing discovery on those other claims, waiting to get a ruling on Counts 1 or 2, or anything like that?

MR. MORRIS: I'll be honest with you, I don't remember off the top of my head, Your Honor.

THE COURT: Okay. All right.

MR. MORRIS: I don't think so. I don't think so.

THE COURT: All right.

MR. MORRIS: I don't think — I don't think for these purposes — well, I'll just leave it at that. I don't know the answer off the top of my head, and I don't want to commit myself to something if I'm not certain.

THE COURT: Okay. All right. Well, don't read anything into my questions. I'm just — I'm wanting to get a report and recommendation to Judge Starr as soon as possible and I was just kind of wanting to know what all hangs —

MR. MORRIS: Sure.

THE COURT: — in the balance if, you know, I were to take a few weeks to get this out. It sets in motion maybe a chain of events. Here's what I'm going to do, in a normal case I would say these things with the hopes that maybe it might encourage settlement. Forgive me for saying in a normal case. This is not normal. There's been nothing about Highland that's been normal. But I'm going to do — I'm going to say right now what I would say in any other case.

I am likely to grant summary judgment here against all the note defendants expect I'm not sure about HCMFA. I need to drill down a little bit more on what the summary judgment evidence is, but you know here's what I've got in front of me. I've got, with the exception of HCMFA, I've got all the other

defendants admitting to the debtor's prima facie case, okay. But what I have is essentially a defense of an oral agreement. Yes, I know that under Texas law oral agreements are sometimes enforceable, but I think context matters. And in the context of promissory notes where all of the essential elements have been admitted to, there's a note on movant, sign the note. Movant's the legal owner or holder of it, and a balance is due. When you've got all of that, you know you better have something very, very significant to create a fact issue for a jury. And here, again, I've got an oral agreement that has morphed from Highland agreed it wouldn't collect on the notes to Highland agreed it wouldn't collect on the notes if certain condition subsequent happened. It's morphed from it was an agreement that Dondero made with himself to many months later it was presented as an agreement between Mr. Dondero and his sister, who happened to not be an officer or director or representative of any sort of Highland or these note makers. And all of this against many months of Rule 26 disclosures that never mentioned Ms. Dondero as a potential fact witness. So we have four out of the five defendants eventually adopting this argument.

So again I, as I probably hinted at during oral arguments, I see there being a nuance here between saying it's a credibility issue for a jury. Credibility of the witness, a jury is entitled to look at credibility questions. There's a nuance between that and a situation of defenses are put out that

create fact issues, but the fact issues just don't seem genuine. And, you know, as we've said, no reasonable — genuine means no — if it's not genuine, that means no reasonable jury could adopt the argument. So I'm very disturbed at both the fact that we've had a morphing defense. And I know, I know it happens in litigation as discovery is undertaken, but that's not what we've had here.

And I'm very disturbed that we have had disclosure after disclosure after disclosure after disclosure where these notes were disclosed and nothing was said about, well, there's a significant contingency so that they might not be collectable. We went through those all today: The audited financial statements; the schedules in the bankruptcy; the MORs in the bankruptcy; a disclosure statement; a plan that very significantly had as a feature attempts to collect on these notes; objections by some of the note defendants to the feasibility of the plan without mentioning, oh, but the notes aren't going to be collectable.

I have to find — Mr. Morris, you mentioned somewhere in the record that there was a disclosure that the Hunter Mountain note was uncollectible. I've never followed exactly where that was. But I just don't understand, frankly, what's going on here. I mean these seem like very dangerous defenses that have been forged here.

I guess no one's worried about materially misleading

audited financial statements. I don't know who saw these financial statements. You know maybe they think that there's no one who could complain about materially misleading financial statements. Maybe they aren't worried about documents signed under penalty of perjury in the bankruptcy case, having been erroneous or materially misleading. But, anyway, I'm kind of doing a soliloquy up here, I guess, but again, you know, in a normal case I would be telling people this is how I'm inclined to rule and people would either settle or not, motivated by what might be coming down the pike.

I promise you I will give a very thorough report and recommendation to Judge Starr so that he will understand the basis for my ruling and he will either accept it or reject it.

And, again, I've told you with HCMFA, you know, we sort have a unique situation out there with this compensation argument, we may have some genuine issues of disputed facts on that one, but I'm not sure. I'm just letting you know that's the one that I find most perplexing.

All right. Is there anything further before we call it quits today?

(The recording ends at 5:00 o'clock p.m.)

—o0o—

State of California)
) SS.
County of Stanislaus)

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of Texas, Office of the Clerk, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

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Susan Palmer
Palmer Reporting Services
P.O. Box 4082
Modesto, California 95352
(209) 915-3065

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